Cellco Partnership d/b/a Verizon Wireless *and* Communications Workers of America, AFL–CIO. Case 2–CA–35987

March 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 23, 2005, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel and the Charging Party filed answering briefs. The Charging Party additionally filed cross-exceptions, a supporting brief, and a reply brief, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified herein and to adopt the recommended Order as modified and set forth in full below.[4]

This case involves allegations that the Respondent committed several unfair labor practices in response to union organizing efforts at its Orangeburg, New York facility. The judge found that the Respondent violated Section 8(a)(1) by (1) promulgating and maintaining rules prohibiting union solicitation in employee work areas and on breaktime; (2) promulgating and maintaining a rule prohibiting employees from discussing discipline they received and terms and conditions of employment; and (3) disparately and selectively enforcing its no-solicitation rules only against those engaged in union solicitation. While finding that the Respondent did not violate Section 8(a)(3) by discharging employee Thai Nguyen, the judge found merit in additional 8(a)(3) allegations that the Respondent had unlawfully issued an oral warning to employee Greg Neubauer on August 28, 2003, and two written warnings to Neubauer on October 8, 2003, and March 25, 2004. The Respondent excepts to all of those unfair labor practice findings, and the Union (Communications Workers of America, AFL–CIO) excepts to the dismissal of the 8(a)(3) allegation related to Nguyen's discharge.

We agree with the judge's findings, except as to the written warnings issued to Neubauer on October 8, 2003, and March 25, 2004. We find for the reasons discussed below that those written warnings did not violate the Act.[5]

I. BACKGROUND

The Respondent, a provider of wireless telecommunications services, employed roughly 400 to 600 customer service representatives at its customer service center in Orangeburg, New York. Those employees worked in cubicles in fairly close proximity to their immediate supervisors on a single floor of the Orangeburg facility.

[1] Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent also filed a letter calling the Board's attention to its recent decision in *St. Mary's Hospital of Blue Springs*, 346 NLRB No. 76 (2006). The General Counsel and the Charging Party each filed a letter response.

[2] There were no exceptions to the judge's dismissal of complaint allegations that the Respondent (1) interrogated employee Steven Ferrante and warned him not to engage in union activity, in violation of Sec. 8(a)(1) of the Act, and (2) disciplined Ferrante, in violation of Sec. 8(a)(3). As a result, we find it unnecessary to pass on the Respondent's exception to the judge's failure to address its argument that the interrogation and warning allegations were untimely under Sec. 10(b) of the Act.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We have modified the judge's recommended Order to more accurately reflect the violations found and to conform to our standard remedial language. Specifically, because the Orangeburg, New York facility involved in this case has been closed, we have modified the recommended Order to provide for mailing of the notice to the affected employees, rather than posting of the notice at another facility as recommended by the judge. See *Reigel Electric & Central Electric Services*, 341 NLRB 198, 198 fn. 2 (2004). Accord: *Indian Hills Care Center*, 321 NLRB 144, 144 (1996) (when the record indicates that the respondent's facility has closed, the Board routinely provides for mailing of the notice to employees). However, we decline to additionally order posting of the notice on the Respondent's internet website, as requested by the Charging Party. In our view, such a measure is not necessary to remedy the violations found. We have further modified the recommended Order to remove the make-whole remedy for discriminatee Greg Neubauer, in accordance with the Respondent's exceptions, as we agree with the Respondent that Neubauer suffered no monetary loss by virtue of the discipline unlawfully issued to him, and therefore is entitled only to expunction of that discipline. Finally, we have substituted a new notice to comport with all of the foregoing modifications.

[5] While adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by prohibiting employees from discussing discipline they received, Chairman Battista and Member Schaumber find it unnecessary to pass on the judge's related finding that the Respondent unlawfully prohibited discussion of terms and conditions of employment, as such a finding would be cumulative and would not materially affect the remedy.

Chairman Battista would similarly find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) by disparately and selectively enforcing its no-solicitation rules only against employees engaged in union solicitation. In view of the violation concerning promulgation and enforcement of the no-solicitation rule, he finds this unfair labor practice to be cumulative, having no material effect on the remedy.

In the spring of 2003,[6] the Union began a campaign to organize the Respondent's customer service representatives at Orangeburg. At all times while this campaign was underway, the Respondent maintained a written policy prohibiting solicitation "during the working time of either the employee making the solicitation or the employee who is being solicited." Notwithstanding this written policy, the record reflects that the Respondent in fact permitted various kinds of solicitation on working time. For example, employees were seen during working time going from cubicle to cubicle selling items (such as candy, meals, and Girl Scout cookies) to their coworkers.

In August, employee Danaya Hilton complained to her managers that fellow employee and union supporter Greg Neubauer had repeatedly disturbed her while she was working to encourage her to sign a union authorization card. On August 28, in response to Hilton's complaint, Associate Director of Customer Service Loraine Smith asked Neubauer to stop "harassing" Hilton at her desk about the Union. Smith orally warned Neubauer that he should not talk about "non related work issues, including the Union, on the [work] floor."

In early October, the Respondent received a similar complaint about Neubauer from employee Myra Rivas. Rivas reported to Associate Director of Customer Service Smith that Neubauer had been visiting her cubicle while she was working, interrupting her with requests that she sign a union authorization card, and generally "getting on her nerves." During one of those visits, according to Smith, Neubauer had placed a picture of himself on Rivas' desk. When Rivas removed the picture, Neubauer replaced it. Rivas again removed the picture after consulting Supervisor Constance Crews Young (Crews) about the situation. Neubauer later questioned Rivas about what happened to the picture and told her that he knew "that bitch" took it, referring to Supervisor Crews.

At about the same time, the Respondent sent an e-mail critical of the Union to its Orangeburg customer service employees. Neubauer immediately replied with his own e-mail criticizing the Respondent's position with regard to the Union. He printed this e-mail response and took it to fellow employee Kim Rivieccio at her cubicle. Neubauer presented the e-mail to Rivieccio and told her to "show this to your fucking supervisors." Annoyed by Neubauer's behavior, Rivieccio loudly told Neubauer to leave her alone.[7] Rivieccio later related the entire incident to her supervisor.

Based on the complaints from Rivas and Rivieccio, the Respondent issued a written warning to Neubauer on October 8. The warning cited Neubauer's solicitation of employees during working time as well as his "inappropriate and insubordinate remarks" about a supervisor and his use of "offensive language." After the Union filed an unfair labor practice charge concerning the warning, the Respondent withdrew it and issued a revised written warning on March 25, 2004, based on the same complaints from Rivas and Rivieccio. The revised written warning deleted references to Neubauer's solicitation on working time and, instead, focused solely on Neubauer's "inappropriate and insubordinate" remarks about Supervisor Crews and his use of offensive language in discussing the Union with Rivieccio.

The Respondent's code of business conduct prohibits "[c]onduct that encourages or permits an offensive or hostile work environment." Although the record evidence shows that profanities were sometimes used on Respondent's premises, there is no evidence that profanities were commonly heard on the work floor. Rivieccio testified that the word "fuck," in particular, was not commonly heard on the work floor during worktime.

II. DISCUSSION

The judge found that the August 28 oral warning and the October 8 and March 25, 2004 written warnings issued to Neubauer were predicated on his engaging in union solicitation and therefore violated Section 8(a)(3). The Respondent excepts to this finding, maintaining that it lawfully disciplined Neubauer based on his grossly inappropriate behavior in his interactions with other employees, including his use of insubordinate and offensive language. For the reasons explained below, we find merit in the Respondent's exceptions in regard to the two written warnings at issue.

The allegedly inappropriate behavior for which Neubauer was orally disciplined on August 28 consisted of Neubauer's repeatedly approaching Hilton, while she was working in her cubicle, to encourage her support for the Union. There is no evidence that Neubauer used offensive language in soliciting Hilton or threatened her in any way. As such, our inquiry here is limited to whether Neubauer's solicitations alone were lawfully subject to discipline. We agree with the judge that they were not.

As stated above, the Respondent maintained a rule prohibiting solicitation for any purpose on working time. Such rules are presumptively lawful. *Our Way, Inc.*, 268

[6] All dates hereafter are in 2003, unless otherwise indicated.

[7] Rivieccio initially testified that she was on the telephone with a customer when Neubauer made this comment to her, but then later indicated that she was not sure if she was actually on the telephone at the time. Neubauer affirmatively testified that Rivieccio was not on the phone when he approached her about the e-mail. The judge did not address this testimonial conflict, but generally relied on Rivieccio's account of what happened.

NLRB 394, 394 (1983). However, the presumption of lawfulness is effectively rebutted here, as the record reflects that the Respondent permitted a variety of nonunion solicitations during working time and sought to enforce its rule only against Neubauer's union solicitation. Id. at 395. In these circumstances, the Respondent's discipline of Neubauer, based on its unlawful and disparately applied rule, violated Section 8(a)(3). *SNE Enterprises,* 347 NLRB No. 43, slip op. at 2 (2006) ("an employer violates Section 8(a)(3) and (1) by imposing discipline or discharge pursuant to an otherwise valid no-solicitation rule, when it intentionally targets union solicitors while tolerating nonunion solicitations by other employees").

The Respondent's subsequent written warnings to Neubauer stand on somewhat different footing. Those warnings were triggered, in part, by Neubauer's continued solicitation on behalf of the Union in October, but they were also based on Neubauer's allegedly egregious conduct while soliciting two particular employees: first, in seeking employee Rivas' support for the Union, Neubauer referred to Supervisor Crews as "that bitch"; and, second, in soliciting employee Rivieccio, Neubauer told her to show a union-related e-mail to her "fucking supervisors." Although Neubauer's profane comments were made during the course of his protected efforts to promote the Union, it does not follow that Neubauer was thereby immunized from discipline.

"[A]lthough employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect" in the workplace. *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). The Board has found that even when an employee is engaged in protected activity, he or she may lose the protection of the Act by virtue of profane and insubordinate comments. See, e.g., *DaimlerChrysler Corp.*, 344 NLRB No. 154, slip op. at 6–7 (2005); *Aluminum Co. of America*, 338 NLRB 20, 21–22 (2002); *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The Board carefully balances four factors in determining whether the protection of the Act has, in fact, been lost in a given situation:

> (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Atlantic Steel Co., supra, 245 NLRB at 816.

Here, the first of these factors, the place of the discussion, weighs heavily in favor of a finding that Neubauer lost the protection of the Act. Neubauer approached Rivas and Rivieccio at their cubicles, on working time. Rivas and Rivieccio worked in a large open area full of cubicles in close proximity to each other occupied by both supervisory and nonsupervisory personnel. In such a place, Neubauer's profane comments were likely to be heard by others, as well as Rivas and Rivieccio, and "would reasonably tend to affect workplace discipline by undermining the authority of the supervisor[s] subject to his vituperative attack[s]." *DaimlerChrysler Corp.*, 344 NLRB No. 154, slip op. at 6.[8]

By contrast, the second factor in the analysis, the subject matter of the discussion, favors a finding that Neubauer did not lose the protection of the Act. Neubauer made the profane comments at issue while exercising his Section 7 right to engage in self-organization: he was encouraging Rivas and Rivieccio to support the Union.

The third factor, the nature of the outburst, weighs heavily in favor of a finding that Neubauer lost the protection of the Act. Although Neubauer's two outbursts were brief, they were profane and insubordinate. In the Respondent's workplace, where profanities (and, particularly, the one used by Neubauer) were not commonly heard on the work floor, Neubauer's profane references to supervisors would necessarily have drawn attention and had a destructive effect on workplace discipline. Indeed, Rivieccio's reaction to Neubauer's outburst, although not determinative, provides some measure of its seriousness: Rivieccio, who often discussed the Union with Neubauer, loudly commanded him to leave her alone, and she promptly reported Neubauer's outburst to her supervisor.

The fourth factor, the presence of an unlawful provocation for the outburst, similarly weighs in favor of a finding that Neubauer lost the protection of the Act. Neubauer's profane outbursts were not a reaction to any unfair labor practice committed by the Respondent. In his outburst directed at Rivieccio, it is arguable that Neubauer was reacting to an e-mail sent earlier by the Respondent to all employees, in which the Respondent criticized the Union. In sending this e-mail, however, the Respondent acted within its rights under Section 8(c) to express its opinion of the Union. The egregious nature of Neubauer's outburst, thus, is not mitigated by reference to the e-mail.

[8] As acknowledged above, the Respondent had earlier disparately applied its workplace solicitation policy when it disciplined Neubauer for soliciting Hilton on August 28. It does not follow, however, that the locus of Neubauer's subsequent solicitations is irrelevant under an *Atlantic Steel* analysis. Indeed, as *Atlantic Steel* makes clear, the locus of the conduct, in this instance a densely populated work space, is an important element of the inquiry.

Based on our analysis, it is apparent that only the second factor, subject matter, favors a finding that Neubauer's outbursts were protected. On these facts, that factor is far outweighed by the remaining factors. We therefore find that, by making his profane remarks, Neubauer lost the protection of the Act.

Our dissenting colleague acknowledges that Neubauer's profane comments were unprovoked by the Respondent, but disagrees with the balance we have struck in considering the remaining *Atlantic Steel* factors. In particular, he contends that we have attached too much weight to the fact that Neubauer made his profane comments in a work area, because the comments were not made directly to any supervisor. Even so, the record shows that the work area was full of cubicles occupied by employees and supervisors alike. It is thus reasonable to assume that others likely overheard Neubauer's outbursts, and that his comments would reasonably tend to undermine the Respondent's supervisors' ability to maintain order and respect. Cf. *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (employee lost the protection of the Act where his profane outbursts were not directed at the specific supervisor involved but overheard by other employees). For similar reasons, we are not persuaded by our colleague's effort to downplay the serious nature of Neubauer's comments. Indeed, unlike our colleague, we can hardly find Neubauer's profane comments "harmless." Neubauer's profane characterization of Supervisor Crews in particular was a purely ad hominem attack unrelated to any legitimate workplace concern.[9] In the end, our colleague's argument rests principally on the fact that Neubauer was engaged in the "core" Section 7 activity of union solicitation. We have given that factor due weight, but, unlike our colleague, we find that this lone factor is overcome by the place and nature of Neubauer's outbursts and the absence of any provocation.

In addition, we disagree with our dissenting colleague's view that the issuance of written warnings based on Neubauer's outbursts constituted an unlawful acceleration in his discipline in violation of Respondent's own progressive discipline policy. Although the record suggests that the Respondent applied progressive discipline, there is no evidence that it progressed by specific increments. The record suggests, in fact, that the Respondent sometimes accelerated discipline (i.e., skipped a level of discipline) in order to levy a punishment more closely fitting the severity of the employee's work infraction.[10]

[9] Neubauer was questioning employee Rivas about who removed a picture of Neubauer from Rivas' desk.

[10] For example, the Respondent sometimes issued "final written warnings" for extreme cases of tardiness, in the absence of earlier written warnings.

In view of all these considerations, we find that the Respondent did not violate Section 8(a)(3) by issuing written warnings to its employee Greg Neubauer on October 8, 2003, and March 25, 2004.

ORDER

The National Labor Relations Board orders that the Respondent, Cellco Partnership d/b/a Verizon Wireless, Orangeburg, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Orally promulgating and maintaining a rule prohibiting union solicitation in employee work areas and on breaktime.

(b) Orally promulgating and maintaining a rule prohibiting its employees from discussing their discipline.

(c) Selectively and disparately enforcing its no-solicitation policy against employees engaged in union solicitation.

(d) Issuing warnings or other discipline to employees for engaging in union solicitation based on a selective and disparate application of its no-solicitation policy.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and cease maintaining unlawful rules prohibiting its employees from soliciting for a union in employee work areas or on breaktime, and notify employees in writing that such rules have been rescinded.

(b) Rescind and cease maintaining unlawful rules prohibiting its employees from discussing their discipline, and notify employees in writing that such rules have been rescinded.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful August 28, 2003 oral warning issued to Greg Neubauer, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful warning will not be used against him in any way.

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense, copies of the attached notice marked "Appendix"[11] to all current employees and former employees employed by the Respondent at its Orangeburg, New York facility at any time since August 28, 2003. Copies of the notice, on forms provided by the Regional Director for Region 2, shall bear the signature

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of the Respondent's authorized representative and shall be mailed to the last known address of each of the employees.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 28, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, concurring in part and dissenting in part.

The Respondent sought to suppress union solicitation at its Orangeburg, New York facility by various unlawful means, focusing its efforts on employee Greg Neubauer, a prominent supporter of the Union. In particular, the Respondent announced an unlawfully broad no-solicitation rule to Neubauer and issued oral and written warnings to Neubauer for his union solicitation while allowing other kinds of solicitation to continue unchecked. The majority finds that the oral warning was unlawful, but declines to find that either the written warning that shortly followed, or a revised version of that written warning, were unlawful. The majority asserts that the written warnings were lawful because Neubauer lost the protection of the Act on account of his fleeting use of profanity in soliciting two of his fellow employees. Because I disagree with that finding, I would conclude, contrary to my colleagues, that the Respondent violated Section 8(a)(3) by issuing those written warnings, as well.[1] I also write to discuss my somewhat broader view of the issues at stake concerning the oral warning, which bears on the disputed allegations.

[1] In further disagreement with my colleagues, I would adopt the judge's finding that the Respondent unlawfully prohibited employees from discussing their terms and conditions of employment. In my view, that finding is not cumulative of the Respondent's unlawful prohibition on employees discussing discipline they had received. In all other respects, I agree with the majority's findings and conclusions.

I. BACKGROUND

In early 2003,[2] the Communications Workers of America, AFL–CIO (the Union) began a campaign to organize the customer service representatives at the Respondent's Orangeburg facility. Employee Greg Neubauer was among a handful of customer service representatives who took an active role in supporting the Union's cause. Neubauer regularly wore a union T-shirt to work and distributed dozens of union authorization cards to his fellow employees; his comments about the Union's organizing campaign were quoted in a New York Times article about tensions between the Respondent and the Union; he appeared with two other employees in a promotional video for the Union, which was filmed behind the Orangeburg facility; and, at a staff meeting in August, he openly questioned managers about the benefits that unionized workers received as compared to nonunionized workers.

At about the time of that staff meeting, employee Danaya Hilton complained to the Respondent that Neubauer was continually interrupting her work to ask her to sign a union authorization card. As a result of Hilton's complaint, Associate Director of Customer Service Loraine Smith met with Neubauer on August 28. At that meeting, Smith told Neubauer that Hilton had complained about his "harassing" her to sign a union authorization card. Smith orally warned Neubauer that he should "not go onto the floor and talk to any of the coworkers or the managers or even talk about non related work issues, including the Union, on the floor," that he could not talk about the Union on his breaktime, and that "if [he] did speak to somebody on the floor that [he] could be terminated; disciplined also."[3]

In early October, two other employees told the Respondent that Neubauer had been approaching them at work to solicit their support for the Union. Employee Myra Rivas complained that Neubauer frequently visited her desk to urge her to sign a union authorization card and that, on one such visit, Neubauer referred to Rivas's supervisor as a "bitch." Soon afterwards, employee Kim Rivieccio told managers that Neubauer came to her desk and presented her with an e-mail he had drafted about the Union, telling her to "show this to your fucking supervisors."

Rivieccio testified that when Neubauer made this comment to her, she loudly told him to leave her alone. She then went to her supervisor, Bridget Armstrong, to explain why she had been so loud, recounting to Arm-

[2] All dates hereafter are in 2003, unless otherwise specified.

[3] As indicated, Smith's statements prohibiting discussion of the Union in any work area and on breaktime violated Sec. 8(a)(1).

strong what Neubauer had said and showing Armstrong the e-mail that Neubauer had handed to her. Rivieccio testified that she went to Armstrong with this information in order to "cover" herself rather than to complain about Neubauer. When Armstrong and Director of Customer Service Carolyn Collins later invited Rivieccio to discuss the incident further, Rivieccio explained to them that Neubauer had not bothered her and that she was not making a complaint about him. There is no evidence that Neubauer was threatening in his interaction with Rivieccio. Nor is there any evidence that Neubauer lingered at Rivieccio's desk once she asked him to leave her alone.

Based on the reports from Rivas and Rivieccio, Smith again called Neubauer to her office for a meeting in early October. Smith testified that, at this meeting, she explained to Neubauer "that we now have three different, separate employees that are complaining . . . regarding some of the same issues: that [you are] harassing [them], that [you are] continually talking to them at their desk about the union, that [you are] continually trying to get them to sign up for the union and that they've asked [you] to stop and [you] ha[ve] not stopped. *And it's the same complaint*. . . . [N]ow we have, you know, a big issue." (Emphasis added.) There is no evidence that, during this meeting, Smith specifically addressed Neubauer's use of profanity on the work floor. Smith concluded the meeting by telling Neubauer that he would be informed shortly as to what steps would be taken in response to his conduct, and she told him that, in the meantime, he "shouldn't go on the floor to speak to anybody about it, employees or managers, because if [he did] there could be additional discipline or even terminat[ion]."[4]

The Respondent issued a written warning to Neubauer on October 8. The warning stated, in relevant part:

> On August 28 you were verbally warned for soliciting employees during work time after concerns about violations of our policy were brought to my attention by co-workers. At that time, we reviewed our No-solicitation Policy and my expectations about general behavior in the workplace. On October 1, I received a second complaint from another co-worker about further violations on your part, including both engaging in solicitation during working time and making inappropriate and insubordinate remarks about your former supervisor (referring to her as "that bitch"). Additionally a second employee came forward on October 2 to share that you had used offensive language again. As a result of these repeated violations of the solicitation and distribution policy and of other requirements of the Code of Conduct, you are being placed on a Written Warning.

The warning also recited the Respondent's written no-solicitation rule and the portions of its code of business conduct prohibiting "threatening, insubordinate, violent or obscene behavior" by an employee.

Over 5 months later, after the Union filed a charge alleging that the Respondent had unlawfully disciplined Neubauer, the Respondent revised its October 8 written warning to delete all references to Neubauer's solicitation activities. The revised warning, issued by Smith on March 25, 2004, stated:

> On October 1, I received a complaint from a co-worker about your making inappropriate and insubordinate remarks about your former supervisor (referring to her as "that bitch"). Additionally a second employee came forward on October 2 to share that you had used offensive language again, in regard to an email of yours that you told her to show to her "fucking supervisor friends." As a result of these repeated violations of the Code of Conduct, you are being placed on a Written Warning.

The revised warning did not set forth the Respondent's no-solicitation rule, instead reciting only the portion of Respondent's code of business conduct allegedly implicated by Neubauer's use of profanity in his interactions with Rivas and Rivieccio.

II. DISCUSSION

The judge found that all three of the Respondent's warnings to Neubauer—the August 28 oral warning, the October 8 written warning, and the March 25, 2004 revised written warning—violated Section 8(a)(3). The Respondent excepts, arguing that the warnings were a lawful response to Neubauer's "harassment" of other employees at work. Like my colleagues, I find no merit in this argument as it relates to the August 28 oral warning. Contrary to my colleagues, however, I would also find that the two later written warnings violated the Act.

A. General Principles

Section 7 of the Act guarantees to employees the right of self-organization, which "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). Employees thus have a right to engage in union solicitation at work, although the Board has long recognized certain limitations on the exercise of this right. See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616–617 (1962) (observing

[4] As stated above, this statement prohibiting Neubauer from discussing his discipline violated Sec. 8(a)(1).

that employer restrictions on union solicitation may be deemed valid based on "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments") (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945)).

In particular, an employee is not free to engage in union solicitation on working time if his employer lawfully prohibits working time solicitation. See *Our Way, Inc.*, 268 NLRB 394, 394 (1983). An employer, however, has not *lawfully* prohibited working-time solicitation if the prohibition is enforced disparately or selectively against union solicitation while permitting solicitations for other purposes. See *SNE Enterprises,* 347 NLRB No. 43, slip op. at 2 (2006) (observing that an employer violates the Act by selectively enforcing an otherwise valid no-solicitation rule against union solicitors); *Clinton Electronics Corp.*, 332 NLRB 479, 479 (2000), enfd. in part 284 F.3d 731 (7th Cir. 2002) (same). The discipline of an employee pursuant to a disparately or selectively enforced no-solicitation rule violates Section 8(a)(3). *Clinton Electronics*, supra, 332 NLRB at 479.

The Board has also held that an employee is not free to carry out union solicitations in an opprobrious or abusive manner. See *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Where an employee conducts himself in such a manner during union solicitations, he risks losing the protection that would otherwise be accorded to his activity under Section 7. See id. ("even an employee who is engaged in protected activity can, by opprobrious conduct, lose the protection of the Act"). Nonetheless, it is also well settled that "not every impropriety committed during [Section 7] activity places the employee beyond the protective shield of the act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). Accord *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003).

The Board strikes the balance between employer and employee rights by carefully considering the circumstances surrounding the employee's allegedly opprobrious behavior. See *Atlantic Steel*, supra, 245 NLRB at 816. The guiding principle, however, remains that set forth long ago in *Bettcher Mfg. Corp.*:

> A line exists beyond which an employee may not with impunity go, but that line must be drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service.

Bettcher Mfg. Corp., 76 NLRB 527, 527 (1948) (internal quotations and citations omitted). Appropriately, this is a high standard: it recognizes "that the economic power of the employer and the employee are not equal, that tempers may run high in this emotional field, that the language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behavior is required." *Dreis & Krump Mfg., Inc.,* 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320, 329 (7th Cir. 1976).

B. The Oral Warning

The Respondent contends that, in August 2003, employee Neubauer was "harassing" fellow employee Danaya Hilton by repeatedly approaching her at her cubicle to ask her to sign a union authorization card. In view of this "harassment," the Respondent maintains, it was justified in issuing an oral warning to Neubauer on August 28. There is no merit to this argument.

The majority finds that the August 28 oral warning was unlawful based on the Respondent's selective enforcement of its no-solicitation policy. I do not disagree with this rationale. The record establishes that, although the Respondent maintained a written rule prohibiting solicitation on working time, it did not rigorously enforce this rule. Indeed, employees went from cubicle to cubicle on a fairly regular basis, selling a variety of items—including candy, meals, and Girl Scout cookies—to fellow employees who were working. Far from stopping those solicitors, supervisors occasionally purchased items from them. In those circumstances, as my colleagues point out, the Respondent could not lawfully discipline Neubauer based on the fact that he had solicited Hilton while she was working. See *SNE Enterprises*, supra, 347 NLRB No. 43, slip op. at 2; *Clinton Electronics*, supra, 332 NLRB at 479.

Additionally, however, I would emphasize that the August 28 oral warning was unlawful because the Respondent has not established that Neubauer, in the course of soliciting Hilton to support the Union, engaged in any conduct that would warrant a finding that he lost the protection of the Act.[5] The law does not permit the Respon-

[5] The judge erred to the extent he analyzed the oral warning under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), for example, by asking whether the Respondent established that it would have disciplined Neubauer even if his solicitation of Hilton had been unrelated to the Union. A *Wright Line* analysis is not appropriate where, as here, the

dent to define Neubauer's protected union solicitation as unprotected harassment and punish it as such. See, e.g., *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 fn. 5 (2000).

Accordingly, the question is whether, under Board law, Neubauer engaged in any conduct that was so egregious as to cost him the protection of the Act. The answer must be no. Hilton's complaints reveal only that Neubauer approached her several times in an effort to secure her support for the Union. There is no claim or showing by the Respondent that Neubauer threatened or intimidated Hilton, used profanity, or otherwise acted in an abusive manner when he spoke to her about the Union. In the circumstances, no consideration of the *Atlantic Steel* factors is even necessary. The "harassment" on which the Respondent acted was simply Hilton's subjective feeling of annoyance at Neubauer's solicitations. Under Board law, union solicitations "do not lose their protection simply because a solicited employee rejects them and feels 'bothered' or 'harassed' or 'abused'" by them. *Frazier Industrial Co.*, 328 NLRB 717, 718–719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). Accord: *Consolidated Diesel*, supra, 332 NLRB at 1020 (employees did not lose the protection of the Act where complaints about their union solicitations "manifested a purely subjective notion of harassment"). Neubauer's solicitations of Hilton therefore retained the protection of the Act, and the Respondent violated Section 8(a)(3) by orally warning him for those solicitations.

C. The Written Warnings

The Respondent's October 8 written warning to Neubauer, and its March 25, 2004 revised written warning, were unlawful for similar reasons.

1. The October 8 written warning

The Respondent asserts that, in early October, it received additional complaints that Neubauer was "harassing" his coworkers. The asserted harassment again consisted of Neubauer approaching employees at their cubicles to encourage their support for the Union. This time, however, the Respondent maintains that Neubauer's solicitations took on a more aggressive and hostile aspect: on a visit to employee Rivas' cubicle, Neubauer referred to Supervisor Crews as a "bitch"; on a visit to employee Rivieccio's cubicle, Neubauer left a printout of an e-mail about the Union, telling Rivieccio to "show this to your fucking supervisors." The Respondent argues that it lawfully issued a written warning to Neubauer on October 8 for that conduct.

In making this argument, the Respondent again proceeds, in part, on the erroneous assumption that Neubauer's working time solicitation for the Union was improper. As explained, Neubauer's solicitation was permissible, notwithstanding the Respondent's written rule prohibiting working time solicitation, because solicitations of various kinds were in fact permitted on working time. See *Clinton Electronics*, supra, 332 NLRB at 479. In these circumstances, the Respondent could not lawfully enforce its written no-solicitation rule against Neubauer. See *SNE Enterprises*, supra, 347 NLRB No. 43, slip op. at 2. Yet the October 8 written warning expressly referenced Neubauer's August discipline for violating the Respondent's no-solicitation policy and Neubauer's "further" violations of this policy in October.

Nor was the Respondent privileged to discipline Neubauer based on its other rules regulating workplace conduct. The October 8 written warning refers to Neubauer's profane remarks to Rivas and Rivieccio as violations of the Respondent's code of business conduct, which prohibits "threatening, insubordinate, violent or obscene behavior." As explained above, however, the Respondent cannot simply apply its code of business conduct where, as here, the asserted violations of the code of business conduct were intertwined with Section 7 activity (i.e., Neubauer's union solicitation). The question is whether Neubauer's comments were so outrageous as to warrant a forfeiture of the protection of the Act.

A fair consideration of the *Atlantic Steel* factors, set forth in the majority opinion, demonstrates that no forfeiture occurred here. The first factor in the analysis—the place of Neubauer's comments—does not weigh as heavily against protection as my colleagues suggest. Although Neubauer's discussions with Rivas and Rivieccio occurred in a work area, he was speaking only to them when he made profane references to Supervisor Crews and other of the Respondent's supervisors. There is no evidence that he used such language in speaking directly to or in the immediate presence of any supervisor, or that his remarks were overheard by any other employees. This is not to completely excuse Neubauer's profanity, but simply to recognize that it did not present as significant a threat to the Respondent's ability to maintain order and respect as cases in which a supervisor is directly confronted with an employee's profanity, or where it is heard by others. Compare, *Cement Transport, Inc.*, 200 NLRB 841, 845–846 (1972) (rejecting argument that an employee lost the protection of the Act because of his "aggressive" union organizing activity, including his reference to the employer's president as a "son-of-a-

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only dispute is about the protected or unprotected nature of the conduct motivating the discipline. See *St. Joseph's Hospital*, 337 NLRB 94, 95 (2001).

bitch"), enfd. 490 F.2d 1024 (6th Cir. 1974), with *DaimlerChrysler Corp.*, 344 NLRB No. 154, slip op. at 6–7 (2005) (finding that employee lost the protection of the Act when he used profanity "repeatedly in a loud ad hominem attack on a supervisor that other workers overheard"). Further, the record shows that foul language was sometimes heard in work areas, making its use by Neubauer not so outrageous as my colleagues make it out to be.

The second factor in the analysis—the subject matter of the discussion—strongly favors a finding that Neubauer's conduct remained protected. Neubauer was engaged in core Section 7 activity: he was attempting to organize his fellow employees. This fact must be accorded substantial weight. As one court has observed, "In the context of a struggle to organize a union, the most repulsive speech enjoys immunity . . . so long as the allegedly offensive actions are directly related to activities protected by the Act and are not so egregious as to be considered indefensible." *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1029–1030 (6th Cir. 1974).

The weight due that second factor is even greater when one considers the third factor in the *Atlantic Steel* analysis—the nature of the employee's behavior. Here, the sum total of Neubauer's alleged misconduct was two profane references to supervisors in one-on-one discussions with coworkers. There is no basis for finding that Neubauer intended to threaten the supervisors in any way, that his comments reasonably could be interpreted as threats, or that they could have had any material impact on discipline. Certainly, his comments pale in comparison to the type of sustained, vituperative attacks that the Board typically has found unprotected. See, e.g., *DaimlerChrysler Corp.*, supra, 344 NLRB No. 154, slip op. at 6–7 (finding that employee lost the protection of the Act when he used profanity "repeatedly in a loud ad hominem attack on a supervisor").

The fourth factor in the analysis—unlawful provocation—admittedly favors a finding that Neubauer lost the protection of the Act. Even here, however, the Respondent responded to Neubauer's union activism with unlawful coercion.

Taking all of those factors into consideration, I cannot join my colleagues in finding that Neubauer's passing use of profanity in the course of his protected union solicitation was so egregious in nature as to deprive him of the Act's protection. In my view, the factors favoring loss of protection are far outweighed by the subject matter of Neubauer's discussions with Rivas and Rivieccio and the harmless nature of his profane comments. Consequently, I would find that the Respondent's discipline of Neubauer on October 8 violated Section 8(a)(3).

2. The March 25, 2004 revised written warning

In an effort to avoid the conclusion that Neubauer was unlawfully disciplined for his protected activity, the Respondent issued a revised version of its October 2003 written warning on March 25, 2004, expunging all references to Neubauer's union solicitation and his August 2003 discipline for that solicitation. The Respondent, however, did not succeed by this means in transforming its unlawful warnings into lawful ones. The March warning was still based on the profane comments Neubauer made in discussing the Union with Rivas and Rivieccio, and, as explained, those comments were not so egregious as to cost Neubauer the protection of the Act. As a result, the Respondent did not escape liability by narrowing its written warnings to rely only on those comments. See *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000) (finding that employer could not lawfully discipline employee for using the word "scab" in encouraging another employee to support the union).

In any event, the editing down of the written warning was insufficient to relieve the Respondent of liability for its unlawful August and October warnings to Neubauer. Board precedent permits an employer to repudiate previous unlawful conduct. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). "To be effective, however, such repudiation must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.'" Id. (quoting *Douglas Division,* 228 NLRB 1016 (1977)). Also, the repudiation must be adequately announced to the employees involved, there must be no proscribed conduct on the employer's part after the announcement, and the repudiation must be accompanied by assurances to the employees that the employer will not, in the future, interfere with their exercise of Section 7 rights. Id.

Here, the Respondent's revised March 2004 written warning did not effectively repudiate its earlier unlawful warnings. The revised warning was, in the first place, untimely: it came nearly 6 months after the Respondent's October 2003 written warning and over 7 months after the Respondent's August 2003 oral warning. Moreover, the revised warning did not acknowledge that the Respondent, by its prior warnings, had unlawfully disciplined Neubauer for his union solicitation and did not contain assurances that the Respondent would not interfere with employee Section 7 activity in the future. Indeed, the revised warning continued to rely, unlawfully, on aspects of Neubauer's conduct related to his union solicitation—aspects of his conduct that, as shown above, retained the protection of the Act. Thus, rather than effectively repudiating the Respondent's earlier unlawful warnings, the Respondent's revised written

warning continued to discipline Neubauer based on his protected activity, thereby further violating Section 8(a)(3).

Finally, even assuming that some discipline was legally permissible based on Neubauer's October conduct, I would still find that the Respondent acted unlawfully in issuing *written* warnings based on that conduct. As my colleagues agree, the Respondent's August 2003 oral warning to Neubauer was unlawful and must be expunged. In the absence of that oral warning, the Respondent's written warnings do not conform to the Respondent's progressive discipline policy. I would find that this deviation from the Respondent's established policy violated the Act.

Dated, Washington, D.C. March 28, 2007

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT orally promulgate and maintain a rule prohibiting our employees from engaging in union solicitation in employee work areas and on breaktime.

WE WILL NOT orally promulgate and maintain a rule prohibiting our employees from discussing their discipline.

WE WILL NOT selectively and disparately enforce our no-solicitation policy against employees engaged in union solicitation.

WE WILL NOT issue warnings or other discipline to employees for engaging in union solicitation based on a selective and disparate application of our no-solicitation policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind and stop maintaining our unlawful rules prohibiting our employees from soliciting for a union in employee work areas or on break time, and notify all of our employees in writing that this has been done.

WE WILL rescind and stop maintaining our unlawful rules prohibiting our employees from discussing their discipline, and notify all of our employees in writing that this has been done.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful August 28, 2003 oral warning issued to Greg Neubauer and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful warning will not be used against him in any way.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

Judith M. Anderson, Esq., for the General Counsel.
Kenneth A. Margolis and *Harlan J. Silverstein, Esqs. (Kauff McClain & McGuire LLP),* of New York, New York, for the Respondent.
Atul Talwar, Esq. (Semel, Young & Norum, Esqs.), of New York, New York, for the Union.

DECISION[*]

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. This case was tried in New York, NY, on 13 days between January 25 and April 13, 2005.[1] Based on certain charges filed by the Communications Workers of America, AFL–CIO (Union), a complaint, which was amended at the hearing, was issued on October 28, 2004 against Cellco Partnership d/b/a Verizon Wireless (Respondent or Employer).[2]

[*] Correction has been made according to an errata issued on January 23, 2006.

[1] The last day of hearing was on April 13. Counsel for the General Counsel requested a further day of hearing to present a rebuttal case. Thereafter, the General Counsel withdrew that request and the hearing was closed by Order.

[2] An original charge and a first, second, third, and fourth amended charges were filed, respectively, on December 11, 2003, and on January 8, February 19, March 4, and May 27, 2004.

The complaint alleges essentially that the Respondent discharged Thai Nguyen, and disciplined Greg Neubauer and Steven Ferrante because of their activities in behalf of the Union. The complaint further alleges that the Respondent (a) enforced a no-solicitation rule in a selective and disparate manner by applying it only against employees engaged in union activities, and by prohibiting union solicitation while permitting nonunion solicitation; (b) promulgated by oral announcement and maintained a rule prohibiting solicitation in employee work areas and on employee breaktime; and (c) prohibited its employees from discussing their terms and conditions of employment. The complaint, as amended at the hearing, further alleges that the Respondent threatened employees with unspecified reprisals if they engaged in union activities, and that it interrogated its employees regarding their union activities. The Respondent's answer denied the material allegations of the complaint, and its answer to the amendment alleged that it is barred by Section 10(b) of the Act, and the doctrines of laches, estoppel, and unclean hands.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a partnership having its principal office and place of business located at 180 Washington Valley Road, Bedminster, New Jersey, has been in the business of providing wireless telecommunication services to customers throughout the United States. Annually, the Respondent derives gross revenues in excess of $500,000 from its business, and purchases and receives equipment and other goods and materials valued in excess of $50,000 directly from suppliers located outside New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

This matter involves the Respondent's Orangeburg, New York customer service center, at which 400 to 600 customer service representatives, supervised by 30 to 40 supervisors and managers, provided services for the Respondent's wireless customers. The customer service representatives were located on the second floor of the facility where they worked in cubicles in fairly close proximity to their immediate supervisors. Their entry on and off duty was recorded when they logged onto and off their computer-telephones, called the aspect phone system.

B. Steven Ferrante

1. Facts

a. The alleged violation concerning Ferrante's union solicitation and threat concerning such solicitation

Ferrante began work for the Respondent as a customer service representative in August 1998, and in December 2001, received a promotion to technical support coordinator.

Ferrante stated that the Union engaged in efforts in 1999, 2002, and in the summer of 2003 to organize the Respondent's employees. Ferrante had been a member of the Union for many years, even before he began work for the Respondent, and he began organizing for it in 1999, about 1 year after he began work. Ferrante actively supported the Union's organizational efforts in each of the campaigns by speaking about the Union to his coworkers on the work floor and giving them cards to sign in that area. He also posted union flyers on bulletin boards in the employee breakroom. He signed two cards, one on October 1, 2002, which he received at the parking lot gate, and the other on September 17, 2003, at his desk from a coworker.

Associate Director John Bigley testified that in early October 2003, he was told by employee Lilly Budesingh that Ferrante interrupted her while she was talking to a customer, asking her to sign a union card. He was also told by employee Tom Regan that Ferrante interrupted him and later asked him to sign a card, and that Regan noticed Ferrante loudly asking employees on the work floor for their opinion of the Union. Bigley told Regan that Ferrante was not prohibited from voicing his opinion about the Union. Bigley mentioned these complaints to Eileen Akbar, the human resources consultant, who asked Bigley to speak to Ferrante.

Ferrante testified that Bigley called him into his office, where they spoke alone. Ferrante quoted Bigley as follows: "It's come to my attention that people have seen you soliciting for the Union on the floor. It's against company policy to solicit on the floor." Ferrante falsely denied soliciting for the Union on the floor. Bigley then said that "they saw you handing out cards," adding that "if you want to solicit for the union, you can do so in the break room or off the property. But there's no soliciting on the floor."

Bigley's version of the conversation is that he told Ferrante what the two employees told him about Ferrante's solicitation. Ferrante denied doing anything wrong, and said that he was "just joking." Bigley reminded him of the Respondent's solicitation policy, told him that he is entitled to his opinion about the Union, but warned that he cannot solicit when employees are on the phone working. No discipline was imposed on Ferrante. In early November 2003, Bigley did not personally know whether Ferrante supported the Union's efforts at the Respondent, nor did he see Ferrante engage in any union activities.

Bigley's communication time dated October 9, 2003, stated as follows:[3]

[3] A communication time is a written account of a supervisor's discussion with an employee. That document may or may not be shown to the worker, and may be placed in the employee's personnel file.

> Spoke with Steve regarding recently reported concerns from others in the tech support and Roaming teams, that he was soliciting union cards in rep cubicles and asking reps if they were going to sign union cards.
>
> Steve advised that he was not passing out union cards in the team. He did say that he was "joking" about the union to the team but that's it. I advised him of the No-solicitation policy and that he cannot be soliciting to other reps in the workplace. I advised that he has a right to his opinion of the union, but he cannot solicit others in the team in the workplace.

Later that month, Ferrante was in the office of supervisor of technical support, Anthony Edwards, where they spoke for about 10 minutes about a call between Ferrante and a customer.[4] Ferrante offered an excuse as to why he did not handle the call correctly, and left the supervisor's cubicle to confirm that excuse with a coworker. He then told Edwards that there had been a problem that day justifying his alleged error. Edwards then said, according to Ferrante: "Look, Ferrante, off the record, I don't give a fuck if the Union gets in here or not. But, I do know what the company will do. Lay low. Keep out of trouble. And don't let Bigley get a hard on for you."[5]

Edwards testified that he was not aware that Ferrante was an active supporter of the Union, had no conversations with him about the Union, and did not see him distribute literature for it. Nevertheless, Edwards was aware that the Union had been attempting to organize the employees of the Respondent, and that the company has mentioned the Union on its website. He has also observed union agents approaching cars in or around the parking lot. However, Edwards denied initiating a conversation with Ferrante about the Union, and specifically denied the conversation attributed to him.

b. The alleged threatening conduct toward a supervisor

The following month, on November 4, Ferrante and about 11 employees attended a training session which was scheduled to begin at 2 p.m. At the start of the session, two supervisors announced that if any of their cars were parked in reserved or visitor parking spaces, they must move their cars or they will be towed. Ferrante, whose vehicle was in a visitor's space, and six or seven other employees left to move their cars, and then returned. Supervisor Frank Pedrayes advised them that since they had to begin the session late, those employees who moved their cars would be marked late. Ferrante and others protested, saying that they had been directed to move their cars. Employee Sharif Murray said he was concerned that his recent promotion would be jeopardized if he is marked late. Supervisor Marvulli told him that he should not worry about it since Supervisor Antonius Thomakos would take care of it. Other employees then protested that one employee should not be treated differently than the others. Pedrayes angrily responded that the situation was comparable to an employee arriving at work on time, but then taking an unauthorized break.

Ferrante testified that during a break in the session, at about 3:30 or 4 p.m., he used the bathroom and then, on his return to the session, saw coworker Patrick McLoughlin speaking to Dionne Carter, the manager of technical support. Ferrante, who was about 10 to 15 feet away from Carter, asked her whether those who moved their cars would be marked late. Carter replied that they would. Ferrante answered, "oh, that's messed up," and then returned to the session with McLoughlin.

McLoughlin testified that during the break, Carter asked various workers including him and Ferrante if they were late. They both denied being late, and Carter asked Ferrante if he had to move his car. He said he did, but repeated that he was not late. Carter then said that he may be subject to a "write up" because technically he was late. Ferrante, who stood about 9 to 12 feet from Carter, with McLoughlin between them, replied, "that's messed up," and they returned to the training session. McLoughlin denied hearing Ferrante raise his voice, wave his hands or make any hand gestures which could be considered threatening.

Ferrante testified that within the next week, Supervisor Edwards told him that Carter believed that he was angry at her. Ferrante asked why. Edwards said because of "the other day." Ferrante asked whether the issue was parking, and Edwards agreed.[6] That day, Ferrante approached Carter because he was curious as to why she believed he was angry at her. He stood about 2 to 3 feet away, and asked whether she believed that he was angry at her. She said she was. He asked if it related to the parking matter, and Carter said yes. Ferrante said he was not mad at her since she was "only the messenger," and then left.

That night, Ferrante believed that it was "weird" that Carter thought he was angry at her, and had "not really responded" in their earlier conversation, so 1 or 2 hours after their initial discussion that day, he approached her again, asking did she "really think" he was mad at her. Carter again said yes. Ferrante again reassured her that he was not mad at her and left.

Carter testified that on November 4 she was advised by Administrative Supervisor Thomakos that several tech support representatives had parked illegally, which he termed a "recurring problem." He asked Carter to address this issue with them, mentioning Ferrante, McLoughlin, and two others. She noticed Ferrante that day during a break in the training session and she called him over. They spoke alone. Carter asked Ferrante if he parked illegally that day. He said he did. Carter said that he should not be parking in that area. Ferrante said he was aware of it, but did so because he did not want to be late to work.[7] Carter advised that he should allow extra time to get to work, and suggested a shuttle bus. Carter stated that Ferrante did not appear to be taking her seriously. She persisted, repeating that he parked illegally in a reserved spot.

[4] It was stipulated that Edwards is a statutory supervisor.

[5] Ferrante's first pretrial affidavit was silent as to this alleged threat. He stated that he asked the Board agent not to include it as he did not want to get Edwards "in trouble." The Union's assertion in its brief that the statement was included in Ferrante's second affidavit is not supported by the record evidence.

[6] In this respect, Ferrante later contradicted himself, stating that he did not volunteer that the issue was because of the parking lot matter. Rather, he was just thinking to himself that that was the issue.

[7] Ferrante and coworker Patrick McLoughlin stated that parking spaces were limited, and each day employees parked illegally.

At that point, according to Carter, Ferrante, whose face was red, loudly and aggressively asked, "what does that mean? Are you going to mark me late for the day?" He began walking toward her with his elbows bent, palms facing outward at chest height, his chest thrust forward, causing Carter to back up to avoid contact with him. Carter testified that she was very frightened and felt threatened, believing that he was attempting to intimidate her. At that moment, Pedrayes approached from behind her and stood next to her, and repeated the information she gave him about parking and lateness. She then directed Ferrante to return to the training session.

Ferrante testified that he was 2 to 3 feet away from Carter during their conversation, and did not raise his voice, flail his arms, or threaten her in any way.

Pedrayes testified that he heard Ferrante speaking very loudly to Carter, and walked toward the area, behind Ferrante. He observed Ferrante walking towards Carter. No one else was present. He described Ferrante as being agitated, very loud, red in the face, his chest thrust out, with his hands outstretched to his sides, saying, "what do you mean I'm going to be marked late?" As Ferrante walked forward, Carter took two steps backward, explaining to him that he could not park in a reserved space. Ferrante calmed down and left. Pedrayes' communication time that day described Ferrante's actions, as follows: "Steve started walking over to Dionne, he was stepping closer to her stating, 'if the parking lot is full, I'll park in any available spot.' I noticed his arms were out and Dionne was stepping back almost as if she was uncomfortable. I stepped in to assist Dionne in explaining the parking guidelines. After this Steve went back to his desk."

Carter further testified that 5 minutes later she called two other employees over, including McLoughlin. She spoke to both about the importance of not parking in reserved spaces, and said it was possible that they would be considered late. Ferrante approached, was very calm and just stood there. Carter first testified that Ferrante said nothing at that time and that she had no further communication with Ferrante that day, but then testified that she believed he said something at that time, and in a later communication time memo about the incident claimed that he again asked if he would be marked late, and she replied that it was possible but no decision had been made. All three workers then returned to the training session.

Carter then told associate director Bigley what occurred during her first conversation with Ferrante, and that Pedrayes was a witness. She mentioned that she was frightened, intimidated and felt unsafe. Bigley asked her to write a communication time about the incident, and asked her to have Pedrayes write one also. Her communication time was consistent with her testimony, except that the memo stated that she told Ferrante that he could be disciplined for parking illegally and for doing so to avoid being late, and that he could be marked late that day. Bigley's communication time was consistent with Carter's testimonial version of the incident.

Carter further testified that 2 days later, on November 6, she approached Edwards' desk and saw Ferrante seated there. Ferrante apologized to her for what happened and said he hoped she did not "take it the wrong way." Carter replied that she did not feel that way about it, and that his conduct made her "uncomfortable." The following week, Ferrante again apologized to her, saying that it was a case of him "killing the messenger" and he did not mean anything by it. Carter did not reply, but told Edwards and Bigley about this contact. According to Edwards, Ferrante apologized to Carter, and then said he hoped she knew that he did not take it seriously. Carter replied that she took it seriously and it was "very upsetting" to her.

Bigley informed the human resources department of the incident, and was later informed by consultant Akbar that a decision was made to issue a final written warning to Ferrante. On November 13, Ferrante received a final written warning for violating the Code of Business Conduct, which states, in relevant part:

> **General Behavior—**
>
> Verizon Wireless employees are required to treat fellow employees, vendors and customers with respect, dignity, honesty and fairness. It is Verizon Wireless' policy that threatening, insubordinate violent or obscene behavior by any employee will not be tolerated. Conduct that encourages or permits an offensive or hostile work environment will not be allowed. Prohibited conduct includes, but it is not limited to, derogatory remarks, discriminatory slurs or harassing jokes. Instead, employees are expected to communicate with candor and respect, listening to each other regardless of level or position. When dealing with customers, vendors and other employees, employees will treat others with respect, by:
>
> - Being courteous and respectful at all times in person, on telephone calls and in all correspondence or communication;
>
> Unprofessional behavior or prohibited conduct that is harmful to the Company's performance will not be tolerated.
>
> **Threats and Violence in the Workplace—**
>
> Verizon Wireless will take all steps necessary to protect its employees and its customers from violent conduct. Employees will not be permitted to endanger co-workers or customers directly or indirectly.
>
> Employees are required to maintain a positive work environment. No one is permitted to behave in a threatening, violent, harassing or obscene manner.
>
> Engaging in any form of violence that affects the workplace, e.g., destruction of Company property or premises, physical intimidation, assault or threat of violence, regardless of where these acts occur is prohibited.

The warning stated that when Carter approached Ferrante to discuss the importance of not parking in reserved parking spaces, he advised that he parked in the space to avoid being late, and she replied that parking in a reserved space was a violation, and that this matter was "previously reviewed with the team." The warning further stated: "At this time, you were observed by . . . supervisor Frank Pedrayes addressing and approaching Dionne in a manner that was viewed to be a [sic] threatening and hostile. Frank ultimately had to intervene in an effort to not let the situation get escalated."

Ferrante received the warning from Bigley and Pedrayes. Bigley told him that he threatened Carter and violated the Code of Business Conduct. Ferrante denied doing so, and Pedrayes said he was there, and saw that "you walked up to her and threatened her." Bigley said he could not engage in such conduct, that she is a woman and he was face to face with her.

Both Carter and Pedrayes denied any knowledge of Ferrante's union activities.

2. Analysis and discussion

a. The alleged interrogation and warning

Ferrante was an open supporter of the Union, speaking to employees about the Union in their work area, giving them cards on the work floor, and posting flyers on employee bulletin boards. He was told by Supervisor Bigley that it had come to Bigley's attention that he had been seen on the work floor soliciting for the Union. The complaint alleges that Bigley's remark constituted an unlawful interrogation of Ferrante.

In *Rossmore House*, 269 NLRB 1176 (1984), the Board abandoned its per se approach concerning questioning of employees about their union activities. Instead, the Board examines all the circumstances surrounding the conversation. Here, I find that Ferrante was an "open and active" supporter of the Union. I base this finding on Ferrante's testimony that he spoke to employees on the work floor about the Union and distributed union cards to them there, presumably in plain view of anyone walking by or observing him. Further, I credit Bigley's testimony that he was told that Ferrante loudly asked employees their opinion of the Union on the work floor. Accordingly, questioning of Ferrante about his union activities, in the absence of threats or promises, does not violate the Act. *Rossmore House*, above. I therefore find and conclude that Ferrante was not unlawfully interrogated by virtue of Bigley's statement.

The communication time recorded by Bigley regarding their conversation will be discussed below in the context of the alleged unlawful application of the no-solicitation clause.

I cannot credit Ferrante's testimony concerning Supervisor Edwards' alleged comment that he did not care if the Union successfully organized the Respondent's employees, but that he was aware of what the company will do, warning him to lay low, keep out of trouble, and don't let Bigley get a hard on for him.

First, this conversation came "out of the blue," during a meeting concerning a customer call. It was devoid of any context or reason as to why Edwards would raise this matter at that time. Second, Ferrante's explanation that he told the Board agent about the comment but convinced her not to include it in his first affidavit because he did not want to get Edwards in trouble is less than persuasive. In addition, there is no evidence that the comment was included in Ferrante's second affidavit. Further, I find that Ferrante's credibility was lacking with respect to his confrontation with Supervisor Carter, for the reasons discussed below. I accordingly credit Edwards' testimony concerning the alleged warning.[8] I therefore find and conclude that Edwards did not make that comment, and I will recommend that that allegation be dismissed.

b. The alleged threatening conduct toward Carter

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing a final written warning to Ferrante for his allegedly threatening conduct toward Dionne Carter.

In order to prove such a violation, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action, and finally the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). Once the General Counsel has made the showings required above, the burden shifts to the Respondent to prove that it would have issued the warning even in the absence of Ferrante's protected conduct. *Wright Line*, 251 NLRB 1083 (1980).

First, it is obvious that Ferrante was an open and active union supporter. He solicited employees to sign cards and distributed cards to employees on the work floor. He was admittedly spoken to by Supervisor Bigley about such conduct. Although Bigley denied being actually aware that Ferrante engaged in such conduct, it is clear that Bigley had sufficient reason to believe that he was doing so. Thus, he was told by two other employees that Ferrante asked them to sign cards. Bigley told human resources consultant Akbar about those employee comments, and was directed by her to speak to Ferrante about the Respondent's solicitation policy.

Wright Line requires the General Counsel to make an initial showing that the protected conduct of an employee was a motivating factor in an employer's decision to take disciplinary action. Proof of such discriminatory motivation can be based on direct evidence of animus toward the protected activity or can be inferred from circumstantial evidence based on the record as a whole. To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the protected activity. *Robert Orr/Sysco Food Servicesm, LLC*, 343 NLRB 1183, 1184 (2004).

As to the issue whether Ferrante's union activities was a motivating factor in his being issued a final written warning, I have recommended dismissal of the two incidents relied on by the General Counsel to support a finding of animus. Thus, I have not found that Ferrante was unlawfully interrogated by Bigley or that he was unlawfully warned by Edwards. Accordingly, the motivational link between Ferrante's unquestioned

[8] In view of my recommendation that the allegations of an unlawful interrogation of, and warning to Ferrante, be dismissed, it is unnecessary to discuss the Respondent's arguments that the complaint was improperly amended, in violation of Sec. 10(b) of the Act, to include those allegations.

union activities and the warning issued on November 13 is weak. However, even if I found that Ferrante was unlawfully interrogated and warned, I would find that the Respondent has met its *Wright Line* burden.

Thus, the evidence supports a finding that the Respondent was justified in issuing the final written warning, and would have done so even in the absence of Ferrante's union activities. *Wright Line*, above. Thus, I have credited the consistent, mutually corroborative testimony of Carter and Pedrayes as to Ferrante's conduct on November 4. It is true that there are minor variations between the two versions, including Pedrayes' testimony that he approached the scene from behind Ferrante, while Carter testified that Pedrayes appeared from behind her while she faced Ferrante. Nevertheless, regardless of where Pedrayes happened on the scene, he was able to observe the nature of the confrontation.

The mutually corroborative written account of the encounter recorded by Carter and Pedrayes contemporaneously with its occurrence lends credence to their version of the incident. In addition, it is likely that Ferrante, who admittedly protested when first told by Pedrayes that he had to move his car and would be marked late, would have reacted strongly at this supposed unfairness when Carter repeated that comment.

Ferrante's admitted remark to Carter that she was the "messenger" implies that she was the bearer of bad news, and he acted out against the messenger. I understand that he explained that remark by saying that since she was only the messenger he was not angry at her, but Carter's version of the statement, that Ferrante told her that it was a case of "killing the messenger" is more believable, and supports a finding that Ferrante considered his strong reaction to Carter's statement uncalled for. Along these lines, Ferrante stated that he asked Carter twice in one evening after the incident whether she believed that he was angry at her. She said she did. It is significant that Ferrante did not ask her *why* she thought he was angry at her. Although it is true that either Ferrante volunteered or Edwards mentioned that the issue was the parking matter, nevertheless, I believe it odd that Ferrante did not question Carter as to precisely why she believed that he was angry at her, particularly since his admitted comment to Carter, "that's messed up," was quite innocuous. If that comment was all he said or did at the time, he would surely have questioned her as to why she believed that inoffensive remark would have caused her to believe that he was angry at her. The obvious answer is that something more than that harmless statement was made. It is clear that Ferrante knew that his conduct in confronting her in an intimidating manner caused her to believe that he was angry at her, and he did not have to ask her for more information.

It is thus likely that Ferrante would have been angered at the allegedly unfair prospect of being marked late, and would have had a more outspoken protest than "that's messed up," especially in view of his vocal protest to Pedrayes earlier, and his belief that another, recently promoted employee would receive special treatment by being excused for the alleged lateness. Further, Carter's credited testimony that Ferrante apologized on two occasions for his conduct is corroborated by Supervisor Edwards who was present during one of the apologies.

This is not a situation which was contrived by the Respondent in order to retaliate against Ferrante for his union activities. It clearly was begun by Ferrante's confrontation of Carter in an intimidating manner. I accordingly find that Ferrante's conduct was in violation of the Respondent's Code of Business Conduct, set forth above, and the final written warning was not improperly issued. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

C. Greg Neubauer

1. Facts

a. Neubauer's union activities

Greg Neubauer, a customer service representative who began work in March 2001, was an active union supporter. Neubauer testified that in 2003 and 2004 he distributed 30 to 40 cards in behalf of the Union, and wore a T-shirt which had the Union's logo and name and the words "UNION YES" in large letters imprinted on it. He wore the shirt sporadically about two times each week, possibly on "casual Fridays" in 2002 and 2003. Nothing was said to him by any management official about his wearing the shirt. On June 30, 2003, Neubauer was identified in a New York Times article entitled "Union and Verizon at odds on focus of talks," as being a customer service representative at the call center in Orangeburg, NY. He was quoted as saying "the unionization campaign there failed because of management's campaign against it. A lot of people are for the union, but people are afraid—some of them are intimidated." Neubauer stated that that newspaper was sold in the Respondent's cafeteria. No management official spoke to him about the article.

In July 2003, employees Neubauer, Nguyen, and Scott Nappi recorded a video presentation behind the Respondent's premises in which they spoke about the benefits of unionization. It was released in the period January to March 2004. After its release, Neubauer saw it on the union website. No management official spoke to him about his appearance in the video.

In August 2003, a staff meeting was held which was attended by 60 employees, and Christopher Grennan, the general manager, Matt Antonek, a Verizon attorney, and Carolyn Collins, the director of customer service. Antonek described the recent union contract with the wireless technicians. Neubauer asked why those employees were able to negotiate job responsibilities and obtain a grievance procedure and merit raises, while the customer service representatives were not. Antonek did not respond. No management official told Neubauer that he or she was upset by his question at that meeting. Neubauer continued to receive commendations for his work after he was outspoken about the Union at that meeting.

b. The warnings

Associate director of customer service, Loraine Smith. testified that in August 2003, Supervisor Janet Parker told her that employee Danaya Hilton complained to her about unwanted text messages and visits to her desk by Neubauer, and that Hilton asked him to stop the messages but he did not. Smith consulted director of customer service Collins, who told her that it was not a company issue at that point, and that she should tell Neubauer to stop. About 1 week later, Parker told Smith that

Hilton reported to her that Neubauer was continuing his messages and visits, that he was trying to have her sign for the Union, and continually interrupting her work.

Smith stated that on August 27, Hilton again complained to her that Neubauer continued to text message and visit her, asking her to sign for the Union. According to Smith, Hilton described his conduct as "relentless." Two of the messages she received that day at work denigrated the company. Smith said she would talk to Neubauer. Smith told Collins that this was a second complaint against Neubauer by Hilton, and that Hilton told her that Neubauer was harassing her.

Smith met with Neubauer on August 28, and according to her, she told Neubauer that Hilton complained about receiving text messages. He replied that he knew that Smith would speak to him because Hilton told him a supervisor was "pressuring" her to stop text messaging him. Smith told Neubauer that Hilton asked that he stop "harassing" her. Smith told him to stop text messaging Hilton, visiting her while she was at work and interrupting her while she spoke to customers with a discussion about the Union and a request that she sign for it. He replied that he told Hilton that he would stop such conduct. A couple of days later, Smith told Hilton that she spoke to Neubauer.

Neubauer's version of the August 28 meeting is that Smith told him that she received a complaint from Hilton that he was "harassing" her at her desk about signing up for the Union. Neubauer replied that he was not "aware of this going on" and asked if there was something in writing concerning the matter. Smith said no. Neubauer asked for a meeting with the human resources department. Neubauer stated that Smith refused the request, saying that it is a matter just between them, and could not be discussed with human resources personnel. She also said that he should "not go onto the floor and talk to any of the coworkers or the managers or even talk about non related work issues, including the Union, on the floor." He further quoted her as saying that he could not talk about the Union on his break time, and that "if I did speak to somebody on the floor that I could be terminated; disciplined also."

The Respondent apparently invited its employees to an informational meeting about the Union, and on September 23, Neubauer sent an e-mail asking, "how can I attend the anti-union meeting with Matt Antonek? Me and a few others have questions that [sic] would like to be answered. I really would like to participate."

On October 2, an e-mail was sent by management to all employees entitled "CWA SAYS 'we won' did they?" which contradicted the Union's September 10 claim of victory over management in recent negotiations. The Respondent's e-mail stated that the Union could not brag about the wireless contract just negotiated since it achieved none of its goals, and although management did not want to "diminish" the contract it agreed to which it termed "fair," it stated that it was "nowhere near the deal the union demanded."

Neubauer immediately sent a reply which stated, "oh by the way, why don't you tell everyone wireless techs make over $50,000 your [sic] a disgrace smearing you [sic] own employees." He printed his reply and brought it to the desk of coworker Kim Rivieccio, who was not speaking on the phone to a customer at that time. They discussed the two e-mails. Neubauer stated that he told her to show it to her supervisor and other workers. Neubauer at first testified that he did not recall telling Rivieccio to show his response to her "fucking supervisor," but later denied doing so.

Smith stated that in early October 2003, Myra Rivas told her that Neubauer had been frequently visiting her at her desk while at work, interrupting her, asking her to sign a card for the Union, trying to give her information and a union card, and "getting on her nerves." He put a picture of himself on her desk which she removed but he replaced. Finally, she spoke to her supervisor Constance Crews Young,[9] about the matter, who advised her to remove it. Neubauer asked Rivas where it was and she replied that she did not know. Neubauer answered that he knew that that "bitch" Crews took it as she hates him. Rivas did not testify.

On October 8, Neubauer was called into a meeting with Supervisor Robin Nowak and official Loraine Smith, who told him that following the complaint she received from Hilton in August, she received additional complaints from Rivieccio and Myra Rivas that he was "harassing" his coworkers on the work floor, including forcing Rivas to sign a card for the Union, and using foul language. Neubauer responded that he was "not aware" of this, and denied forcing Rivas to sign a card. At hearing, he conceded having "casual" conversations with Rivas about the Union on nonwork time, but denied repeatedly trying to have her sign a card at her desk. His request to meet with the human resources department and Rivas was denied by the two supervisors. Neubauer testified that Smith advised that he would be informed shortly what steps would be taken, but that he "shouldn't go on the floor to speak to anybody about it, employees or managers, because if I do there could be additional discipline or even [sic] terminated."

Smith testified about her early October meeting with Neubauer, at which Nowak was present. Smith stated that they reviewed their August 28 discussion regarding Hilton. Neubauer denied continuing to text message Hilton. They said they received complaints from two other employees. Neubauer denied cursing when he gave Rivieccio his e-mail response. He also denied cursing in referring to Supervisor Crews, and denied speaking to Rivas at her desk about the Union. Smith told him that a total of three employees complained about his harassing them by speaking to them at their desk about the Union and attempting to have them sign for the Union, and that he was asked to stop and has not. Neubauer accused Smith of believing the others and not him.

Smith spoke to director of customer service, Collins, and on October 8, Neubauer received a written warning issued by Smith. The warning stated, in relevant part:

> On August 28 you were verbally warned for soliciting employees during work time after concerns about violations of our policy were brought to my attention by co-workers. At that time, we reviewed our No-solicitation Policy and my expectations about general behavior in the workplace. On October 1, I received a second complaint from another co-worker about further violations on your part, including both engaging

[9] She will be referred to hereafter as "Crews."

> in solicitation during working time and making inappropriate and insubordinate remarks about your former supervisor (referring to her as "that bitch"). Additionally a second employee came forward on October 2 to share that you had used offensive language again. As a result of these repeated violations of the solicitation and distribution policy and of other requirements of the Code of Conduct, you are being placed on a Written Warning.

The warning quoted management's policies on solicitation, distribution and offensive conduct. Neubauer told Nowak and Smith that the complaints were "false." At hearing, Neubauer stated that he did not recall referring to his former supervisor as a "bitch."

Thereafter, Smith and the human resources department told Neubauer that the warning would expire after 90 days. Following the issuance of the warning, Smith noticed that Neubauer wore his union shirt more often than before.

Neubauer stated that he first spoke to Hilton on November 8 regarding her complaint about him. He waited more than 2 months after the August 28 warning to speak to her because he was afraid of being discharged due to Smith's warning that he not speak to anyone about it. He did not want to say anything to anyone and tried to "lay low," hoping that the matter would "go away."[10] He and Hilton were friends, and according to Neubauer, Hilton told him that she had not complained about him, and the alleged harassment "did not happen."

Neubauer testified that in December, Hilton told him that she was "very upset" that management claimed that she accused him of harassing her and attempting to make her sign for the Union. Neubauer asked her to give him a signed letter to that effect. She agreed "as long as it's between us." On December 16, he asked Hilton to write her version of the incident. He denied waiting until then to ask her because he received a final written warning on December 8 and believed that he would be discharged.[11]

Instead of her writing it, Neubauer typed a letter and left it with Hilton at her desk. According to Neubauer, Hilton asked him to return later at which time she would give it to him. One hour later he did so. The letter states: "12/16/03. I Danaya Hilton never was solicited or harassed by Greg Neubauer for Union activity nor did I make any complaint to Verizon Wireless management." It bears a signature, but at hearing, Hilton denied signing it, as set forth below. Neubauer kept the letter and did not give it to management, but he produced it at the hearing.

Neubauer stated that he occasionally used his cell phone to text-message his coworkers during work time, conceding that he sent such messages to Hilton, but he denied going to Hilton's work area to "press" her to sign a union card. He did not recall attempting to talk to her regarding nonwork matters while she was assisting customers on the phone. He did concede that Hilton told him to stop sending her test messages, but that was after he received the warning on October 8.

In December 2003, Neubauer spoke to Rivieccio about the October 8 warning, asking whether she complained about him harassing her regarding signing with the Union at her desk and using obscene language. Rivieccio denied making a complaint.

On March 25, 2004, Neubauer received a revised written warning issued by Nowak, which replaced the October 8 warning. He was told that the earlier warning concerning solicitation of employees was removed from his file, and indeed that matter was absent from the new warning which was issued by Smith, and which stated, in relevant part:

> On October 1, I received a complaint from a co-worker about your making inappropriate and insubordinate remarks about your former supervisor (referring to her as "that bitch"). Additionally a second employee came forward on October 2 to share that you had used offensive language again, in regard to an e-mail of yours that you told her to show to her "fucking supervisor friends." As a result of these repeated violations of the Code of Conduct, you are being placed on a Written Warning.

Neubauer testified that the use of obscenities was commonplace at the premises, with "everyone" using foul language, including Supervisor Nowak who used the terms "shit" and "damn." Nowak did not testify. Neubauer stated that the heard the word "fuck" about 5 to 10 times per day at work.

Neubauer was discharged in May 2004. A charge was filed concerning the discharge but it was subsequently withdrawn.

c. The testimony of Danaya Hilton

Danaya Hilton testified that in August 2003, Neubauer text messaged her at work about once or twice per day on her personal cell phone, and visited her desk once per day while she was working. During the visits, he put union cards on her desk nearly every day and told her that the workers needed to sign cards for the Union because the Respondent does what it wants. She found this conduct "annoying," and told him to stop visiting her but he persisted, although not as often as before. She said that company policy permitted the receipt of emergency cell phone calls, but that text messaging and talking at one's desk is prohibited.

Hilton complained to her supervisor, Janet Parker, and associate director of customer service, Loraine Smith, about Neubauer's conduct because she wanted it to cease. She showed Smith certain of the text messages, in which he spoke about their jobs and Respondent, but not the Union. Hilton denied responding to the messages.

Hilton stated that in late August or early September 2003, 1 or 2 weeks after she complained to Smith, Neubauer asked her if she complained to Smith that he was harassing her. Hilton said no, adding that she complained that he was "annoying" her and she wanted it to stop. Neubauer asked if she would sign a letter stating that she did not complain that he was harassing her. Hilton agreed.

The following day, Neubauer brought her a letter which stated: "I Danaya Hilton never was solicited or harassed by Greg Neubauer for Union activity nor did I make any complaint to Verizon management." Hilton told Neubauer that she would not sign it because it was not what she agreed to sign. Neubauer

[10] Neubauer's pretrial affidavit states that he first spoke to Hilton about the matter 1 month after the August 28 warning.

[11] That warning related to a different matter—being away from his desk while his phone was available for customer calls.

agreed to write another letter and give it to Hilton, but he never did so. The letter, produced by Neubauer at the hearing, but not given to management, contains a signature "D Hilton" which Hilton denied she wrote. Neubauer stated that he did not see her sign the letter. Hilton stated that she never signed her name with the initial of her first name and full last name. The documents received in evidence bearing her signature support that testimony.

I credit Hilton's testimony in this regard. If she had actually signed the letter, it would have supported Neubauer's claim that he did not harass her, and it seems logical that he would have presented it to management. Why would Neubauer ask her for the letter if he did not intend to rebut management's claim of harassment with her signed letter stating that he did not harass her. But Hilton believably testified that she refused to sign the letter because it contained the false statements that Neubauer did not solicit her for the Union, and that she did not complain to management about his conduct. In fact, he did solicit her, and she did complain.[12]

d. The testimony of Kim Rivieccio

Kim Rivieccio stated that Neubauer often discussed the benefits of the Union with her, and if she disagreed, he would argue the matter, pointing out its positive features. She testified that in the fall of 2003, Neubauer sent her an e-mail relating to the Union, then went to her desk and showed her a document, perhaps the October 2 e-mail referred to above, that claimed that the Respondent was "keeping something" from the workers, and told her to "show this to your fucking supervisors."

Rivieccio, who was on the phone with a customer at that time, found this approach annoying, and loudly told him that she was on the phone, or asked him to leave her alone. Her supervisor, Bridget Armstrong, looked over toward them. Neubauer at first testified that he did not recall telling Rivieccio to show his response to her "fucking supervisor," but later denied doing so.

Later, Rivieccio explained to Armstrong the nature of the conversation with Neubauer in order to "cover" herself, and explain her possibly disrupting others with her loud rebuke of Neubauer. She told Armstrong that she was "tired" of his conversations about the Union, showed her the document Neubauer gave her, and repeated the obscene remark he made. She also told Armstrong that she did not want her name involved, and was assured by Armstrong that the matter would just be between customer service director Caroline Collins and Armstrong. Rivieccio denied telling Armstrong that she was complaining about Neubauer. Thereafter, Neubauer did not speak to her regarding any complaint she might have made to management.

Later that day, Rivieccio was called into a meeting with Collins and Armstrong. Collins told her that she was permitted to speak about the Union, but such discussions could not affect the performance of anyone's job, by soliciting or approaching a worker's desk and interrupting them while they were working. Collins asked if Neubauer's conduct bothered her. Rivieccio replied that Neubauer was not bothering her and she was not making a complaint, but just wanted it known that she was at her desk working, and that Neubauer constantly spoke about the Union and was "lobbying" for it. Collins said that "nothing will be done" and that she should not worry about it.

Rivieccio stated that she has heard the word "fuck" used at work, usually in the break room or outside the building, but it was not commonly heard on the work floor during work time. She noted that she was not offended when Neubauer used the term "fucking supervisor." She also stated that occasionally, when she was not speaking to a customer on the phone, she spoke to coworkers, and at times her coworkers came to her desk and they asked each other for help.

e. Solicitation by the Respondent's employees

The Respondent's Code of Business Conduct was effective March 1, 2003. Regarding solicitation and distribution of materials, it states as follows:

> **Solicitation**—Solicitations are prohibited during the working time of either the employee making the solicitation or the employee who is being solicited. The term "working time" does not include meal times, break periods, or other times the employee is not required to be working.
>
> **Distribution**—Distribution of non-work related literature is prohibited in work areas at all times. Employees may distribute literature in non-work areas on non-working time. "Non-work areas" include places such as lunchrooms, washrooms, lounges or any other area specifically set aside for non-work purposes. The distribution of literature in such a manner as to cause litter on Company premises is prohibited.

Ferrante testified that between August 1 and November, 2003, he saw employees on the work floor selling food and other items. Specifically, he saw Donald Byrd selling Coca Cola for his church, and observed Supervisor Edwards buying it without comment. Edwards denied doing so, adding that he did not see Byrd selling that beverage. In October, employee Ingrid Chockwells sold homemade jam which an employee bought. He also saw Girl Scout cookies and candy being sold, with candy being sold nearly every 2 weeks. Those sales were witnessed by Supervisor Marvulli in October. Neither supervisor told the sellers that they could not sell those items on the work floor. Ferrante was at work at each time he observed these sales.

McLoughlin stated that in the year encompassing January 2003 to January 2004, he saw employees selling similar items, and specifically saw employee Will Humphrey selling meals prepared by his wife for $5 during the last quarter of 2003. In fact, McLoughlin purchased them during his work time, and when he was on break. McLoughlin and his son sold candy on his day off to workers who were then on work time. He observed supervisors on duty at such times, and in fact, he sold candy to Supervisor Pedrayes and associate director, Christopher Grennan. He was not advised to refrain from this solicitation. He also saw supervisors purchase candles. Neither Pedrayes nor Grennan contradicted such testimony.

Neubauer testified that he saw employees solicit others in selling products or in making donations. In the fall of 2003, he

[12] The letter bore a date of December 16, 2003, which Hilton denied was on the letter when he asked her to sign it.

saw employee Christine Johnson selling cookies and candy for her children, and he made a purchase while on work time.

Nguyen testified that in 2003 he saw employees walking from cubicle to cubicle, selling and buying products such as Girl Scout cookies, candy bars, and catalog items on the work floor. Such solicitation, which occurred while he was on the phone with customers, occurred once every few months that year. He specifically stated that he observed Supervisors Crews and Hahn purchase candy bars from an employee selling them for her child's school's fund-raiser. Crews did not deny any of the above events. Hahn did not testify.

Nancy Percent, the Respondent's executive director of human resources, testified that solicitation is not permitted during work time in work areas, regardless of the reason for the solicitation. She was aware of the employee who delivered lunches on company time, and she was counseled to stop violating the no-solicitation policy. Similarly, if an employee's selling candy in violation of the policy was brought to management's attention, it would be stopped.

On March 10, 2004, Supervisor Marcella Cernaro wrote a communication time regarding her conversation with employee Felicia Wooten. Cernaro observed her selling cookies and candy on the work floor. Wooten explained that she had taken one-half day vacation to undertake this activity. Cernaro told her that she could not solicit on the floor during work and/or work break times or days off. Cernaro warned that any further violation of the no-solicitation policy would result in further disciplinary action. On March 19, associate director, Noreen Stack, wrote a communication time in which she told employee Jennifer Zaldivar on February 27 that she could not sell Girl Scout Cookies in the work area. None of those mentioned in the two communication times testified at the hearing. It should be noted that both communication times were written after the filing of the third amended charge on March 4, 2004, which alleged, for the first time, that the Respondent "enforced a no-solicitation policy selectively and disparately whereby the Employer prohibited union solicitation and permitted nonunion solicitation."

2. Analysis and discussion

a. The pronouncement and maintenance of rules prohibiting solicitation by employees and their speaking to employees about their discipline and terms and conditions of employment

The complaint alleges that the Respondent orally announced a rule prohibiting solicitation in employee work areas and on break time, and prohibited its employees from discussing their discipline and terms and conditions of employment with their coworkers.

As set forth above, Neubauer testified that when he received the verbal warning on August 28, Smith concluded the meeting by telling him that this matter was only between them and that he should "not go onto the floor and talk to any of the coworkers or the managers or even talk about non related work issues, including the Union, on the floor." He further quoted her as saying that he could not talk about the Union on his break time, and that "if I did speak to somebody on the floor that" he could be disciplined or terminated.

Neubauer further testified that when he was given the written warning on October 8, he was again told by Smith in Nowak's presence that he "shouldn't go on the floor to speak to anybody about it, [the written warning] employees or managers, because if I do there could be additional discipline or even [sic] terminated."

In early October, Supervisor Bigley admittedly told Ferrante that he received reports that he was soliciting employees to sign cards, and he advised Ferrante of the no-solicitation policy, and that he could not solicit employees "in the workplace." A communication time dated October 9, set forth above, memorialized this message to Ferrante.

I credit Neubauer's testimony regarding what he was told by Smith on August 28 and October 8, because such testimony was not contradicted by Smith, and Nowak did not testify. I find further support for my finding that the statements were made since the identical direction was admittedly given to Ferrante by Supervisor Bigley, set forth above, that he could not solicit employees in the workplace. Additional support for my finding derives from director Blasko's admission that he advised Nguyen not to discuss the information he learned while witnessing Nappi's termination interview.

Thus, three rules were announced: Employees could not discuss or solicit for the Union on the work floor or on their break time, they could not discuss non-related work issues, and they could not discuss their discipline with their coworkers.

In determining whether the maintenance of certain work rules violates Section 8(a)(1) of the Act, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). If the rule explicitly restricts activities protected by Section 7, it is unlawful.

"It is well established that employees have the right under Section 7 to engage in union solicitation on the employer's premises during nonwork time, unless the employer can demonstrate the need to limit the exercise of that right in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). Absent such a justification, a rule prohibiting employee solicitation which is not by its terms limited to working time violates Section 8(a)(1) because the rule explicitly prohibits employee activity that the Board has found to be protected by Section 7. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646, 654–655 (2004); *Our Way, Inc*., 268 NLRB 394 (1983). "It is axiomatic that merely maintaining an overly broad rule violates the Act." *Beverly Health & Rehabilitation Services,* 332 NLRB 347, 349 (2000). The Respondent's direction that Neubauer not discuss nonrelated work issues presumably refers to his terms and conditions of employment.

In deciding whether a rule unlawfully prohibits employee discussion of discipline or disciplinary investigations, the Board determines whether the employer's asserted business justifications for the prohibition outweighs employees' Section 7 right to discuss such terms and conditions of employment. *Caesar's Palace,* 336 NLRB 271, 272 (2001).

In *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999), the Board held that the respondent maintained an overly broad confidentiality rule by prohibiting employees

from discussing their discipline with other workers. There was no proof of a legitimate business justification for the imposition of this prohibition. The Board held that such a rule "constitutes a clear restraint on employees' right to engage in concerted activities for mutual aid and protection concerning undeniably significant terms of employment. . . . Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights."

It is important that employees be permitted to communicate the circumstances of their discipline to their coworkers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense. In *Phoenix Transit System*, 337 NLRB 510 (2002), the Board found violative a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. Here, the Respondent has not offered any business justification for prohibiting Neubauer from discussing his written warning, and accordingly I find that it violated Section 8(a)(1) of the Act in doing so.

I accordingly find and conclude that the Respondent's oral promulgation of rules during the conversations with Neubauer on August 28 and October 8 prohibiting union solicitation on the work floor and on employees' break time, prohibiting employees from discussing nonrelated work issues, and prohibiting them from discussing their discipline, as set forth above, were overly broad, and violated employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

b. The warnings to Neubauer

The complaint alleges that on August 28 and October 8, 2003, the Respondent selectively and disparately enforced its no-solicitation rule by applying it only against employees engaged in union activities, and by prohibiting union solicitation while permitting nonunion solicitation. The complaint alleges that the warnings given to Neubauer on August 28, October 8, 2003, and March 25, 2004, violated the Act in that they were issued (a) pursuant to the Respondent's unlawful application of its no-solicitation clause and (b) because of Neubauer's support of the Union.

The complaint does not allege that the Respondent's no-solicitation clause is unlawful. It is a facially lawful clause. What is alleged, however, is that in oral and written warnings to Neubauer, the rule was set forth in such a way as to be unlawful, and that the rule was selectively applied to prohibit union solicitation while permitting nonunion solicitation.

I find that although the Respondent's no-solicitation policy was facially valid, it was disparately applied by enforcing it against union solicitation, and not against other types of solicitation.

Solicitations not involving the Union were frequent, widespread, openly conducted, but did not result in any discipline. Thus, as set forth above, various food items were sold to employees and supervisors on the work floor who were at work at the time. Those supervisors who testified did not deny that such sales took place, with the exception of Edwards, who denied seeing a sale attributed to him, and Percent who testified that she counseled one employee not to sell food items.

The only documented instance of management's awareness of such sales were two communication times which were written only after a charge was filed alleging that the no-solicitation clause was "selectively and disparately enforced." No discipline was issued relating to those two incidents. In contrast, Neubauer was issued a verbal warning on August 28, and written warnings on October 8, 2003, and March 25, 2004, for engaging in solicitation in behalf of the Union. Proof that the Respondent enforced its no-solicitation policy after the Union filed its charge concerning this matter does not negate a finding that the warnings, when issued, constituted disparate enforcement of the policy.

It must be noted in this context that the brief interruptions in work, if there were any, due to Neubauer's conversations with his coworkers consumed much less time than the presentation of food items for sale, their examination and their purchase by employees.

The Board has held that an employer violates Section 8(a)(3) of the Act by issuing disciplinary warnings to employees for violations of its no-solicitation rule in the context of a union organizing campaign and in a manner disparate from past practices. The discipline of an employee for violating a no-solicitation rule by engaging in union activity violates Section 8(a)(3) of the Act when the discipline amounts to disparate enforcement of the rule. Discipline based on such disparate treatment may be found to be motivated by union animus. *Promedica Health Systems*, 343 NLRB 1351, 1363, 1382 (2004); *Clinton Electronics Corp*., 332 NLRB 479 (2000).

In *ITT Industries*, 331 NLRB 4 (2000), enf. 251 F.3d 995, 1006 (D.C. Cir. 2001), the Board stated that "it is well established that where an employer forbids employees to discuss unionization on work time but permits discussion of other subjects unrelated to work, the disparate rule is itself unlawful." The Board noted that, notwithstanding the existence of a facially valid no-solicitation rule, the employer permitted employees and managers to engage in discussion and solicitation on the production floor. As occurred here, when certain employees complained about an employee's union solicitation, the employee was issued a warning not to engage in any discussion of the union with any employee on the floor. The Board found that the warning constituted disparate treatment, and violated the employee's statutory rights.

Neubauer was an open and active union supporter. The warnings that he was issued on August 28, October 8, 2003, and March 25, 2004, related to his solicitation in behalf of the Union, and were motivated by union animus inasmuch as he was disciplined for engaging in union solicitation, while others engaging in other types of solicitations were not disciplined. The warnings related to his solicitations were inextricably intertwined with the warnings regarding his conversations with Hilton and Rivieccio. Accordingly, his activities in behalf of the Union were the motivating factor in the discipline given to him.

The August 28 verbal warning issued to Neubauer was based on a complaint made by Hilton concerning his attempt to have her sign a card for the Union. An employee's effort to persuade

another employee to sign a union authorization card is activity that the Act protects. Such activity may lose that protection if the activity is "sufficiently abusive or threatening." However, improperly limiting a soliciting employee's activity results in limiting an activity that is "central to the purposes of the Act." *Patrick Industries*, 318 NLRB 245, 248 (1995).

Although official Smith told Neubauer that Hilton complained that he was "harassing" her, Hilton expressly denied that she believed that he was harassing her. Nor did she testify that she told Smith that Neubauer was harassing her. She stated that she told Smith only that she found his conduct "annoying" and wanted it to cease. While it is true that Hilton brought her concerns to her supervisors and the investigation into the complaint was prompted by Hilton, it is equally clear that Smith embellished and exaggerated Hilton's report by incorrectly accusing Neubauer of harassing Hilton.

The Respondent asserts that it disciplined Neubauer because of its good-faith belief that he engaged in improper conduct. But there is nothing in Neubauer's conduct which was prohibited by the Respondent's Code of Business Conduct. He did not harass, threaten or intimidate Hilton. Rather, the warnings were based on solicitations which were clearly protected activity. Neubauer did nothing which would forfeit the protection of the Act. Hilton's subjective reaction to his solicitation, simply that she was "annoyed," cannot deprive him of that protection. In addition, when Hilton first complained about Neubauer's conduct, director of customer service Collins said that it was not a company issue at that point.

The Respondent has not shown that it would have issued the three warnings to Neubauer even if his solicitation of Hilton had not been in behalf of the Union. Thus, there is no evidence that he said or did anything that could reasonably be interpreted as "harassment," as alleged by the Respondent. He simply spoke to her about the Union and asked her to sign a card for it. He made no verbal threats or threatening gestures. Although Hilton testified that she was annoyed by his frequent solicitations, there was no showing that she feared that he would be violent. It was the Respondent's supervisor who asserted that Neubauer "harassed" her. In fact, Hilton expressly denied being harassed by Neubauer. Even if Hilton believed that she was harassed, the Board has held that an employee's subjective belief that union solicitation constitutes harassment cannot, without more, deprive that solicitation of the protection of the Act. *Nicholas County Health Care Center*, 331 NLRB 970, 982–983 (2000).

"Although an employer may lawfully discipline an employee for making prounion (or antiunion) statements that threaten fellow employees (for example, with physical harm), an employer may not lawfully discipline an employee for making prounion (or antiunion) statements that merely cause another employee to feel uncomfortable." *Chartwells, Chartwells, Compass Group, USA, Inc.,* 324 NLRB 1155, 1157 (2004), or "annoyed." *Alpine Log Homes*, 335 NLRB 885, 894–895 2001); *RCN Corp*., 333 NLRB 295, 300 (2001). Union solicitations do not lose their protection simply because a solicited employee is the subject of persistent solicitation and feels "bothered," harassed" or "abused" by them. *Frazier Industries, Co.*, 328 NLRB 717, 718–719 (1999).

Similarly, the October 8 warning issued to Neubauer involved his solicitation for the Union and his making "inappropriate and insubordinate remarks" to coworker Rivas about his former supervisor, referring to her as "that bitch," and another alleged remark that he asked Rivieccio to show his e-mail, which discussed the Respondent's attitude toward the Union, to her "fucking supervisors."

Rivas did not testify, but Rivieccio testified that Neubauer did tell her to show his e-mail to her "fucking supervisors." Rivieccio, too, found his approach "annoying," but made no complaint to her supervisor about it. Rather, she loudly asked him to leave, but then in order to "cover" herself for uttering a loud rebuke, explained to supervisor Armstrong that she was "tired" of his conversations about the Union. Rivieccio insisted to her supervisor that Neubauer's conduct did not bother her and she was not making a complaint. Although Supervisor Collins assured her that nothing would be done about it, nevertheless Neubauer received a written warning for his conduct.

The written warnings issued to Neubauer on October 8, 2003, and March 25, 2004, stated that his use of "offensive language" violated the Code of Conduct, specifically his use of "inappropriate and insubordinate remarks" about his former supervisor. Obscene language, of the type used by Neubauer in these conversations, is apparently not uncommon in the Respondent's workplace, as set forth above. The remark about his supervisor was not made to the supervisor, but to Rivieccio, who was not offended by Neubauer's use of the obscenity. *Fieldcrest Cannon, Inc*., 318 NLRB 470, 544 (1995); *Meco Corp*., 304 NLRB 331, 333, 335 (1991).

The e-mail referred to by Neubauer while making the comment about the supervisor, related to his response to the Respondent's assessment of its recent contract with technicians, and thus constituted protected activity. The obscenity, uttered in connection with his protected activity of handing a copy of his response to Rivieccio, could hardly be considered unprotected, particularly where she was not offended by it.

Accordingly, I find that the three warnings issued to Neubauer on August 28, October 8, 2003, and March 25, 2004, violated the Act because they constituted disparate enforcement of the solicitation policy and because they were motivated by union animus. I cannot find that the Respondent would have issued the warnings in the absence of Neubauer's activities in behalf of the Union. Each warning related in some way to his Union activity—the solicitation of employees, and his response to the Respondent's e-mail concerning the Union. *Wright Line,* above.

The Respondent argues that its withdrawal of the October 8 written warning requires that the allegation relating to that warning and the prior August 28 verbal warning be dismissed. As set forth above, on March 25, 2004, a revised warning was issued to Neubauer which omitted any reference to the two prior warnings relating to solicitation.

> In order to effectively negate a prior unlawful statement, a subsequent clarification must, inter alia, be timely and unambiguous, must specifically disavow the prior coercive statement, and must be accompanied by assurances against future

interference with employees' Section 7 rights. *President Riverboat Casinos of Missouri,* 329 NLRB 77, 78 (1999).

I find that the Respondent's omission of Neubauer's prior warnings from the reissued March 25 warning did not effectively repudiate them. First, the purported repudiation was not timely. It was issued 5-1/2 months after the October 8 warning and more than 7 months after the August 28 warning.[13] It was not unambiguous. The March 25 warning did not specifically state that by its issuance it was expressly withdrawing those parts of the prior warnings relating to Neubauer's solicitation of employees. Nor did it specifically disavow the previous warnings, or give Neubauer any assurance that the Respondent would not interfere with his Section 7 rights thereafter.

D. Thai Nguyen

1. The facts concerning Nguyen's employment and discharge

Thai Nguyen began work in August 2002 as a customer service representative, and was discharged on January 12, 2004, for lateness. He was an active supporter of the Union, which had begun its organizing drive before he was hired. In April or May 2003, he spoke to his coworkers about the benefits of the Union, and about 1 month later he began wearing a union T-shirt which he wore about every other Friday from May or June 2003 until mid-October, 2003.[14] Nguyen signed three union cards—in March 2003, August 22, 2003, and October 20, 2003, in the parking lot of the Respondent's premises.

Nguyen also distributed union literature in the Respondent's parking lot, and solicited employees to sign cards for the Union from April or May 2003 to mid-October 2003, in the parking lot or cafeteria during their breaks. In June or July 2003, he participated in a union video with coworkers Neubauer and Nappi which was filmed behind the Respondent's building. In the video, Nguyen mentioned that the Union was needed in order to obtain better salaries and benefits, and to have a voice in Respondent's policies which affect the workers.

Nguyen received numerous commendations for his work and compliments from his supervisor, Crews, some received after he began organizing in behalf of the Union.

Nguyen received a number of warnings for lateness prior to the new lateness policy of April 1, 2003, which defined lateness as being tardy in excess of 5 minutes. Under the prior policy, an employee was late if he was tardy in excess of 1 minute:

(a) Verbal warning issued on February 1, 2003 for four latenesses, one of which was for four minutes, and two of which, for 90 and 119 minutes, Nguyen questioned because he made up the time at the end of the day, and therefore believed that they were excused.

(b) Written warning issued on March 17, 2003 for five latenesses, four of which were for latenesses of one or two minutes.

Under the new policy effective April 1, 2003, the March 17 written warning would expire 6 months after its issuance, or in September 2003, if he had not had any further lateness occurrences by then. However, he was late again in July 2003.

Associate director of customer service, Blasko, testified that he spoke to Nguyen in July concerning two latenesses that month. Blasko told him that he could issue a final written warning, but did not want to because it would prevent him from obtaining career opportunities with the Respondent. He warned Nguyen that if he was late again, he would receive a final written warning.

Nguyen received a final written warning for lateness dated August 12, 2003.[15] At a meeting with Crews and Blasko, Nguyen disagreed with the warning because the warning letter listed nine latenesses of 1 or 2 minutes, and he claimed that the clock used to record his arrival time was inaccurate, being off by 1 or 2 minutes. In any event, those latenesses would not count as lateness occurrences since they were less than 5 minutes.[16] Nevertheless, three latenesses set forth in the warning—2 for 6 minutes and one for 7 minutes on August 7, violated the Respondent's policy on lateness. That policy, effective on April 1, 2003, defines lateness as being in excess of 5 minutes. The warning stated that Nguyen's next lateness "will result in further disciplinary action up to and including separation from Verizon Wireless payroll." The warning further stated that he was eligible to apply for leave under FMLA or could request help from the Employee Assistance Program.

On August 25, 2003, Nguyen was 19 minutes late due to highway construction. When he arrived, he told Crews why he was late. He testified that Crews said that she was aware of the construction, and also said that his lateness would not be a problem, or "it would be okay" as long as he made up the time at the end of the day, which he did. His e-mail to Crews stated that he was late due to highway construction, and stated that he would make up the time. Crews stated that after she received his e-mail, she called in an "exception," and later told him that he should have left his residence earlier. She denied telling him that his lateness was excused or that it would not be a problem as long as he made up the time.

Nancy Percent, the Respondent's executive director of human resources, testified that upon being advised of the August 25 lateness, her assistant showed her the final written warning dated August 12, and recommended that Nguyen be terminated upon his August 25 lateness, which is permitted if the employee is late following his final written warning. She concluded that the reason for the August 25 lateness, highway construction, was not "compelling."

[13] An attempted repudiation more than 5 months after the issuance of unlawful no-solicitation instructions was deemed untimely. *Red Arrow Freight Lines*, 289 NLRB 227 fn. 1 (1988).

[14] He testified later that he wore the shirt on every "Casual Friday." The record is not clear whether such an event occurs every Friday.

[15] A final written warning dated August 8 was apparently replaced by one dated August 12. The August 8 warning contained two alleged latenesses, June 3 and June 5, which were withdrawn and not included in the August 12 warning. They were apparently for lateness for overtime work, which does not count toward a lateness under the attendance policy.

[16] In this connection, Crews stated that the time displayed on the computer terminal differed by about 1 minute from the time on the aspect reader board and the aspect phone system, but that discrepancy did not affect his late arrival to work.

However, Percent further testified that managers have at times excused employees for being stuck in traffic, but such an action typically occurs regarding a "known traffic jam or something extenuating."

Percent was "reluctant" to terminate Nguyen at that time. She examined his prior attendance record, and observed that his latenesses, which took place in 5 of the past 6 months, were not "egregious"—only 7 to 8 minutes. She stated that it was "not uncommon" to give an employee extra chances at that point even if they had been issued a final written warning. She also believed that she had to be "careful" and "extra sensitive" in making sure the termination would be lawful inasmuch as Nguyen, an Asian, was in a "protected" class, and had been observed wearing a union shirt, and she did not want to violate the law by unlawfully discharging an employee based on his protected status. Accordingly, Percent decided to give Nguyen an extra chance, and recommended that he be given a second final written warning. Accordingly, a second final written warning, dated August 28, based on the August 25 lateness, was given to Nguyen.

That warning was given to Nguyen by Blasko on September 2. The warning was based on the August 25 lateness. At their meeting, according to Nguyen, Blasko told him that Crews' comment that his lateness was not a problem "did not matter." Blasko testified that he told Nguyen that he could be terminated now, but that management decided to reissue the final written warning, but it was not excusing the August 25 lateness. Blasko denied that Nguyen told him that Crews excused that lateness.

It is the Respondent's argument that although Nguyen was permitted to make up the time on August 25 that he was late that day, the lateness was not excused, and in fact he was marked 19 minutes late for that tardiness. Accordingly, Nguyen received a second final written warning dated August 28 for the August 25 lateness. That warning listed the prior three latenesses exceeding 6 minutes.

Thereafter, from mid October 2003 to January 1, 2004, Nguyen did not engage in any activities on behalf of the Union, including wearing a union shirt because he was told by a union agent that he should "lay low," allegedly because of some agreement between the Respondent and the Union. On January 2, he resumed wearing a union shirt because he believed that with the start of a new year he should resume speaking with employees about the Union's benefits.

On October 31, Nguyen was 7 minutes late, and customer service management requested that he be reviewed for termination. Blasko testified that Supervisor Crews told him that Nguyen said he was late because he switched his shift that day with another worker. Percent reviewed his total lateness record, and decided not to terminate him since his latest lateness was only 7 minutes, and it had been 2 months since he was late prior to that. She wanted to give him "the benefit of the doubt," and "every opportunity to turn it around and change the pattern." Accordingly, Percent decided to give him another chance.

Nguyen was also late on December 29 because employee Edward Gerwin, who picked him up and drove him to work, forgot to do so. Nguyen was scheduled to begin work at 11:30 a.m., but he clocked in at 11:44 that morning. Upon his arrival, he told Crews that Gerwin failed to pick him up on time, and according to Nguyen she said that as long as he made up the time that day, it was "okay" and it "would not be held against me." Gerwin testified that he spoke to Crews and apologized for failing to pick up Nguyen on time. He stated that, although he could not remember her exact words, he believed that Nguyen's lateness would be "excused." Crews denied excusing the lateness.

That evening, Nguyen sent an e-mail to Crews, asking her to "call in an exception" because he would be working 15 minutes after his shift "to make up the time from this morning." Crews' e-mail reply stated that she was sorry to hear that he was late, and that she called in the exception "for the make up time." While acknowledging at hearing that Crews' reply did not state that his lateness was excused, Nguyen insisted that a supervisor's calling in an exception means that his lateness was excused, but Crews testified that in notifying resource management of the exception she did not intend to excuse his lateness, and denied telling Nguyen that she had done so.

Blasko became aware of this newest lateness, and reviewed Nguyen's complete record with the human resources department, and it was again requested that he be reviewed for termination. On January 6, 2004, Laurie Severino, the associate director for human resources, sent an e-mail to associate director of human resources, Annette Lowther, requesting his lateness record, adding that as to the most recent lateness, she knew that he was being driven to work, "however ultimately it is his responsibility for being there on time." Severino sent another e-mail to Lowther and Percent, saying, "unless this lateness was weather related, not sure why we would give him another chance . . . would be interested in the feedback from [company attorney]. Has he had any [less than 5 minute [latenesses] from the time we issued his 2nd [final written warning]? I want to be mindful of our thought process as I [terminate] for the other locations." Lowther sent an e-mail to Percent, essentially as follows, which set forth Nguyen's lateness record:

> Written warning on 3/17/03.
>
> Transitioned [moved on to the new lateness policy] on 4/1/03 on a written warning.
>
> Late 3 times over 5 minutes) 7/7/03; 7/14/03; 8/7/03.
>
> Late 9 times under 5 minutes from April through August 7.[17]
>
> Issued a final written warning on 8/12/03.
>
> Late 19 minutes on 8/25. Issued a second final written warning.
>
> Late 7 minutes on 10/31.
>
> Late 14 minutes on 12/29.

It should be noted that under the new lateness policy which became effective on April 1, 2003, following a written warning, the employee is given one "free" lateness, and upon the second lateness may be issued a final written warning. As set forth above, Nguyen could have been issued a final written warning upon his lateness of July 14. Instead, he was issued the final

[17] Although a lateness less than 5 minutes does not count against the employee, Percent testified that this could be considered a "pattern of lateness," and she considered that in deciding to terminate Nguyen.

written warning only upon his lateness of August 7. In addition, upon the next lateness, he is reviewed for termination and could be dismissed. As set forth above, he could have been terminated for his lateness of August 25. Instead, he was issued a second final written warning. He could also have been fired upon his next lateness on October 31, but he was not. Finally, he was discharged upon his final lateness of December 29.

Lowther testified that Blasko told her in late December, that Nguyen was late again and had been recommended for termination. Lowther asked Blasko to review the matter with director of customer service Collins. In early January, Collins told Lowther than she agreed with Blasko's recommendation for termination in that Nguyen received two final written warnings, and was late twice thereafter, in contrast with others who had been terminated in the past month who had received less lenient treatment.

Lowther then reviewed Nguyen's entire disciplinary record—including his latenesess, absences, and a final written warning in early 2003 concerning his confrontation with a supervisor.

Percent asked Lowther to take an "extra step" and give her examples of employees who had been terminated in the last 2 to 3 months so that a decision to terminate Nguyen would be "absolutely clean and consistent"—"butt them up against Nguyen"—with recent discharges.

Lowther reviewed the final disciplinary records of four employees, Barbara Lolagne, Katia Muehl, Kalisha Ross, and Julia Sierra all of whom, except Sierra, were terminated in December 2003. Lowther asked human resources consultant, Akbar, to obtain the records for those specific employees. None had engaged in union activity, but all were female, two were African American, and one was Hispanic. The records revealed:

> (a) Barbara Lolagne—received a verbal warning, and then a written warning after four more latenesses. She received a final written warning for a 62 minute lateness, and then terminated after a further 12 minute lateness. She was given two extra chances beyond policy between the verbal and written warning.
>
> (b) Katia Muehl—received a written warning after five latenesses, and a final written warning after an 87 minute lateness. She was terminated after a further lateness of 8 minutes due to a flood in her home. She received one extra chance beyond policy.
>
> (c) Kalisha Ross—received a written warning for a 78 minute lateness. She received a final written warning after three additional latenesses, including a 46 minute lateness, and was late again for 47 minutes. She resigned in lieu of termination. She was given one extra chance beyond policy, which was before she received the final written warning.
>
> (d) Julia Sierra—received a written warning after being late four times. She received a final written warning [on December 12, 2003] after being late two times. She was late again but termination was not pursued because it was a lateness of only five minutes. She was late again, for 35 minutes because her car broke down. She was then terminated. She was given two extra chances beyond policy, two before the final written warning, and one after it, partly because she had a "personal issue" that management was aware of, and worked with her regarding it. When Sierra's record was being reviewed, she had not yet been terminated, but was being reviewed for termination.[18]

Lowther either sent this summary to Percent, or reviewed it with her before January 12, the date Nguyen was terminated. Lowther also testified that her mandate as associate director of human resources is to ensure that employees are treated fairly and consistently, according to the law. Lowther testified that it is extremely important that customer service representatives be at work according to their schedules since employee lateness may cause customer calls to be taken in a less than timely manner. Lowther recommended to Percent that Nguyen be terminated, noting that he had received more lenient treatment than the four other workers who had been terminated.

In reviewing the matter with Percent or with in-house counsel Celeste Como, Lowther mentioned Nguyen's union activity, which she noted, was similar to an employee being in a protected class. In fact, in early January, Lowther was aware that Board charges were then pending against the Respondent, but not involving Nguyen. She stated that it made her more cautious in ensuring that Nguyen's case was being carefully reviewed.

Percent testified that she decided to terminate Nguyen because he was unreliable or he demonstrated a pattern of being unreliable. She noted that management had tried to "work with" Nguyen by giving him extra chances, but she concluded that his overall record of reliability was poor, and the last incident of lateness was "not compelling enough" to warrant another chance. She reasoned that Nguyen was required to arrive at work on time regardless of whether the person he rides with mistakenly picked him up late.

Percent also considered that Nguyen had been given four extra chances beyond what was permitted under the disciplinary policy. Thus, after he received a written warning he could have received a final written warning after being late two times, but he received the final written warning after being late three times. In addition, he could have been terminated the first time he was late after his first final written warning of August 12. Instead, he was given a second final written warning for the August 25 lateness. He also could have been terminated upon his October 31 lateness after the second final written warning, but was not. Instead, he was terminated only after he was late again on December 29.

On January 12, 2004, Nguyen was discharged for lateness. At his termination interview with Blasko and Crews, Blasko reviewed with him the fact that he had received a final written warning in August for lateness, discussed above, and that he was late on October 31 and December 29, as set forth above.

[18] The Union disputes Sierra's record, as testified by the Respondent's witnesses. According to GC Exh. 51(a), Sierra was issued a final written warning on June 2, 2003, had seven latenesses thereafter, but received only a written warning on October 12. In testimony concerning Sierra, that final written warning was not mentioned. Accordingly, the Union argues that the June 2, 2003 final written warning was "ignored."

Blasko and Crews stated that Blasko reviewed all the latenesses with Nguyen, who refused to look at the backup reports. Nguyen said that he did not agree with a couple of the latenesses, and denied being late on October 31, because he did not recall switching his shift. Nor did he recall being late on August 25, but he did not claim that he was excused for any of the latenesses Blasko reviewed with him. Instead, Nguyen claimed that the Respondent did not "consistently" apply its lateness policy, stating that other, unnamed employees did not receive warnings for lateness. Blasko denied that Nguyen claimed that he was being fired for union activity.

Nguyen testified that he told Blasko that he did not recall being late on October 31 because he had traded shifts with another employee so that he could work 8 a.m. to 5 p.m. He told Blasko that his wife drove him to work that day and he began work at 8 a.m. At hearing, Nguyen claimed that he logged in before 8 a.m., and began work at 8 a.m. In fact, however, the phone record shows that he logged in at 8:07 a.m. Regarding the December 29 lateness, Nguyen told Blasko that Crews had excused his lateness. Blasko replied that whatever Crews told him was irrelevant because it was his final decision to discharge Nguyen for lateness. Nguyen protested that he believed that he was being fired for his union activities, but Blasko reiterated that "excessive lateness" was the reason for the termination.

Lowther stated that, other than Nguyen, she was not aware of any other employee who received two final written warnings for lateness, and then was late twice thereafter without being terminated.

Perecent denied that Nguyen's union activity played any part in the decision to terminate him. Neither Lowther nor Crews were aware that he appeared in a union video, and neither saw that video. Nevertheless, Lowther was aware, from Nguyen's supervisors, that he believed that unions were a "good idea" which was a view that he openly expressed through his wearing a union shirt. Crews admitted having two conversations in April 2003 with Nguyen about the Union.

In addition to latenesses, Nguyen had been absent on about five occasions from November 2002 to March 21, 2003, and received verbal, written and final written warnings for absenteeism. His 2002 performance appraisal stated that development was needed in the area of attendance.

The General Counsel argues that records of other employees, which were not reviewed by Lowther prior to Nguyen's termination, reveal that Nguyen was subject to disparate treatment inasmuch as certain of their absences were excused, and others were late more often than Nguyen without having been terminated. The Respondent asserts that those records are irrelevant inasmuch as they were not reviewed by the decision-makers who determined to discharge Nguyen.

2. Excused latenesses

There was much testimony concerning excused latenesses. As set forth above, Nguyen claimed that certain of his latenesses were excused by Crews, and she denied excusing them. At one time, according to Blasko, with the implementation of the new attendance policy on April 1, 2003, supervisors were given the authority to excuse latenesses. However, a few months later, they were told that, in order to "maintain consistency in the department," such excused latenesses must be done through the associate directors.

Blasko identified an exception as a term used by the supervisor in making the resource management team aware that an employee was not adhering to his schedule that day. That is done because the work force communications center manages the call volume by the second each day, and must know whether the employee is on his phone. If an employee arrives late without prior approval, the supervisor calls in an exception. Blasko said that an exception is unrelated to an employee being excused for the lateness. Also, if an employee is off-line, due to a meeting, an exception must be called in so that management is aware that his phone would not be in operation during that time. Blasko stated that an employee could be disciplined for a lateness for which the supervisor called in an exception.

Blasko also stated that if an employee is late, his supervisor may permit him to stay late at the end of his shift to make up the time, but such permission does not excuse the lateness. Crews stated that if an employee comes in late due to a traffic accident, she permits the worker to make up the time at the end of the day, so that they are paid for their full shift. If they do not make up the time, they are not paid.

Generally, according to supervisors who testified, a lateness may be excused if many employees in the call center were impacted, such as a highway accident which blocks traffic, or in cases of extreme weather.

Specific examples of individual employees whose latenesses were excused included employee Ulondia Irvin, who advised Supervisor Armstrong on September 5, 2003, that she may be late on September 8 due to a child-care matter. A memo recorded that her 24 minute lateness on September 8 was "excused as an exception due to her childcare issues." However, Armstrong testified that she excused the lateness as a "courtesy," and not as an "exception" as the term is used by resource management. Armstrong also gave an example of an excused lateness where an employee spoke with her when her shift began, causing her to sign in late.

Employee Suzanne Bouchard received an award in September 2003, which permitted her to park in a reserved space for 1 month. She was late to work several times because another vehicle was parked in her space. Her latenesses were excused because they were not caused by her actions. The General Counsel argues, in this regard, that Nguyen's final lateness was also not caused by his own actions in that his carpool driver Gerwin failed to pick him up on time. However, the Respondent legitimately discounted that reason since ultimately it was Nguyen's responsibility to arrive on time. In Bouchard's case, she would have been on time but for another employee's taking her reserved parking space.

On October 31, 2003, employee Katia Muehl arrived at work on time with her children because her child care person had not come to her home. Armstrong permitted Muehl to leave work to take the children to a family member and return to work, and excused her 2-hour latneess. It should be noted that although these supervisors approved the latenesses, authority may have been received from the associate directors.

As set forth above, Nguyen claimed that as long as he made up the time by working later on a day he arrived late, the lateness would be excused. In support of this testimony, Katia Muehl was 14 minutes late on September 23, 2003, due to highway flooding. She worked 19 minutes later that evening. Her supervisor, Rigo Villafuerte, issued a written warning on October 29, which expressly stated that her lateness of September 23 was excused.[19] Accordingly, I cannot accept Villafuerte's testimony that that lateness was not excused, or the implication that because the lateness was listed on an occurrence log it was not excused. All latenesses, even those which do not count toward discipline, are listed on the log. Thus, that log listed latenesses of 1 minute even though they do not count as a lateness occurrence under the policy in effect at that time. He further stated that a lateness is not excused because the worker made up the time by remaining at work later. But in any event, that lateness may have been excused pursuant to the general policy of excusing latenesses caused by highway conditions affecting many workers, so it is of little help to Nguyen. Muehl was also 78 minutes late on September 25. Her occurrence log states that that lateness was excused by Armstrong. At hearing, Armstrong did not recall excusing that lateness.

Employee Brian Mackle was seven minutes late on November 12, 2003. A notation on his occurrence log stated that the lateness was "excused—parking lot incident." Thomakos testified that Mackle either was in an accident in the lot or was involved in an argument about a parking space at that time.

3. Analysis and discussion

Pursuant to *Wright Line*, the General Counsel has proven that Nguyen engaged in activity in behalf of the Union. Such activity included signing cards for the Union, speaking to coworkers about its benefits and soliciting them to sign cards for it, appearing in a union video, and wearing a union T-shirt for 4 months in 2003, and then again in early January 2004 shortly before his discharge. His union activity was well known to the Respondent from the supervisor level to the highest echelon at the call center. Thus, Supervisor Crews, and director of the call center, Caroline Collins, saw him wearing the T-shirt, and those deciding to discharge him, Lowther and Percent, were aware of his support of the Union.

I have found, above, that union animus has been proven in that the Respondent committed violations of the Act in the oral promulgation of rules prohibiting solicitation on the work floor and on break time and in speaking to employees concerning discipline and working conditions, in the Respondent's warnings to Neubauer concerning his solicitation of employees, and in enforcing its no-solicitation clause in a disparate manner so as to prohibit union, but not other solicitations.

However, the facts as set forth above, do not permit me to find that the Respondent's animus toward the Union was a motivating factor in its discharge of Nguyen. If it had such animus, it could have discharged him when he began wearing the union T-shirt, or when it became known that he solicited in behalf of the Union. In addition, it could have terminated him at the first opportunity it could have for lateness. It did not do so. His union activities were well known for many months prior to his discharge, yet no improper disciplinary actions were taken against him at any time. In addition, he was given numerous awards and commendations notwithstanding his contemporaneous support for the Union. The Respondent also withheld discharging him when it could have done so in accordance with its lateness policy.

I accordingly find that the Respondent was not motivated by union animus in discharging Nguyen, and even if such motivation was found, I conclude that the Respondent would have discharged him even in the absence of his union activities. *Wright Line*.

Thus, as set forth above, Nyguen was late numerous times, and was not treated more harshly than the Respondent's lateness policy permitted, and was not even subject to the letter of that policy. Rather, certain latenesses were overlooked and not made the basis of discipline although they could have been. It has been noted above that Nguyen could have been issued a final written warning upon his lateness of July 14. Instead, he was issued a final written warning only upon his lateness of August 7. In addition, he could have been dismissed upon his next lateness of August 25. Instead, he was issued a second final written warning. He could also have been fired upon his next lateness on October 31, but he was not. He was discharged upon his final lateness of December 29. These instances of extra chances being given demonstrates that Nguyen was (a) not treated in a discriminatory fashion and (b) properly discharged.

It simply has not been proven that the latenesses which Nguyen claimed to have been excused for, were in fact excused by Crews. There was no credible evidence that by calling in an "exception," Nguyen's latenesses were excused. Rather, credible evidence was presented that excused latenesses were usually made for extenuating circumstances which did not encompass the reasons for Nguyen's lateness.

In this regard, I agree with the General Counsel that there are certain instances of excused latenesses in the record which are not explained, and may have included situations where individual employees were excused because of personal, singular situations, which did not involve highway incidents affecting many workers or in cases of extreme weather. However, the vast majority of excused latenesses cited by the General Counsel in her brief involved highway issues, weather problems and vehicle accidents.

The Union argues, and the record establishes that employee Lovely Woods was treated more leniently in certain respects than Nguyen. (GC Exh. 49.) For example, Woods' final written warning for lateness was due to expire on August 11, 2003, but she was late on June 16, which should have prevented that warning from expiring. She was late thereafter on September 10, 22, 23, October 19, and December 2, 8, and 17, and received only a written warning for her lateness on December 17. Pursuant to the Respondent's policy, she should have been terminated for lateness after her final written warning.

The Union also argues that Nguyen was treated in a disparate manner under the old lateness policy which was in effect prior to April 1, 2003. Specifically, the Union argues that he was transitioned onto the new policy on a written warning, whereas

[19] R. Exh. 39(g).

that warning was issued when he had fewer latenesses than other employees who did not receive a written warning. However, if he was treated in an inconsistent manner at that time, it was clearly not because of his union activities. His activities in behalf of the Union did not begin, according to his testimony, until sometime in April or May 2003, when he spoke to his coworkers about the benefits of the Union, and only in May or June did his activities become open and notorious when he began wearing a union T-shirt.

The Respondent's officials examined the records of three employees who were discharged in the month prior to Nguyen's being reviewed for termination in order to be certain that his discharge was consistent with theirs. It is appropriate that their records be examined from the period following their receipt of a written warning inasmuch as Nguyen became subject to the new lateness policy with a written warning. Their records disclose the following:

Barbara Lolagne was issued a written warning on October 23, 2003. Thereafter, she was 62 minutes late, and given a final written warning on November 6. According to the Respondent's policy, where a lateness is more than 60 minutes, discipline may be accelerated to the next level. Accordingly, instead of being given one "free" lateness after the written warning, Lolagne was accelerated to the next level of discipline, final written warning, after her 62 minute lateness. On November 17 she was late again and was terminated.

Katia Muehl received a written warning on October 29. Thereafter, she was 87 minutes late on November 1 and was given a final written warning. The same acceleration applied to Muehl as to Lolagne, above. Thereafter, she was 8 minutes late, and was terminated.

Thus, Lolagne and Muehl were treated strictly according to the Respondent's lateness policy following the issuance of their written warnings. Their next lateness was accelerated to a final written warning because they were more than 60 minutes late. In addition, they were late once more after that and were discharged.

Kalisha Ross received a written warning on August 11. Thereafter, she was late three times and received a final written warning on September 30. In this regard, she was given one extra lateness before receiving the final written warning. She was late again on November 8, and was due to be terminated on December 10, but she resigned in lieu of termination.

After Nguyen received a written warning he was late three times, being given one extra lateness, similar to the treatment accorded Ross. After receiving the final written warning, Lolagne, Muehl, and Ross were discharged upon their next lateness in accordance with the Respondent's policy. In contrast, after receiving his final written warning, Nguyen was permitted two additional lateness, and was therefore late twice before being fired for his third lateness. In addition, there is no record of an employee being given two final written warnings for lateness. Nguyen could have been discharged upon being late once after the first final written warning. Instead, he was discharged after his third lateness.

I have considered the evidence of disparate treatment, and find that the record establishes that the Respondent did, in fact, discharge employees with excessive latenesses, as it discharged Nguyen, but also, as in the case of Woods, failed to terminate a worker following her excessive latenesses after a final written warning. However, I return to Nguyen's latenesses which exceeded the Respondent's legitimate lateness policy, and for which it could properly discharge him. I have also considered that when the Respondent was considering terminating Nguyen, the employees' records selected for comparison—Lolagne, Muehl, and Ross, showed that they were treated less leniently than Nguyen.

Under these circumstances, I find that the General Counsel has not proven a Section 8(a)(3) violation by a preponderance of the evidence. *Ronin Shipbuilding, Inc.,* 330 NLRB 464 (2000).

In view of my decision finding no violation in Nguyen's discharge, I need not discuss other issues including whether he falsified his employment application or made an obscene phone call to the Respondent following his discharge.

CONCLUSIONS OF LAW

1. By issuing warnings to employee Greg Neubauer on about August 28, 2003, October 8, 2003, and March 25, 2004, because of the Respondent's disparate application of its no-solicitation clause and because he engaged in union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

2. By promulgating by oral announcement and maintaining a rule prohibiting union solicitation in employee work areas and on break time, the Respondent violated Section 8(a)(1) of the Act.

3. By promulgating by oral announcement and maintaining a rule prohibiting its employees from discussing their discipline and terms and conditions of employment, the Respondent violated Section 8(a)(1) of the Act.

4. By enforcing its no-solicitation rule by selectively and disparately applying it only against employees engaged in union activities, and by prohibiting union solicitation while permitting nonunion solicitation, the Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that the Respondent rescind the disciplinary warnings issued to employee Greg Neubauer on about August 28, 2003, October 8, 2003, and March 25, 2004; remove any reference to those warnings from all of the Respondent's records; and make him whole for any loss of earnings and other benefits, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent orally promulgated rules unlawfully prohibiting union solicitation in employee work areas and on break time, and prohibiting its employees from discussing their discipline and terms and conditions of employment, I shall order that the Respondent rescind the unlaw-

ful rules and to notify its employees, in writing, that it has done so.

Inasmuch as the facility at issue here in Orangeburg, New York, was closed in about September 2004, I shall order that the Notice to be posted herein be posted at the Respondent's facility in Wilmington, North Carolina, to which certain of its employees were relocated.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Cellco Partnership d/b/a Verizon Wireless, Bedminster, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily issuing warnings to, or otherwise disciplining employees by issuing such warnings pursuant to the Respondent's disparate application of its no-solicitation clause, and because employees engaged in union activities.

(b) Orally promulgating and maintaining a rule prohibiting union solicitation in employee work areas and on break time.

(c) Orally promulgating and maintaining a rule prohibiting its employees from discussing their discipline and terms and conditions of employment.

(d) Enforcing its no-solicitation rule by selectively and disparately applying it only against employees engaged in union activities, and by prohibiting union solicitation while permitting nonunion solicitation.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Greg Neubauer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplines of employee Greg Neubauer, and within 3 days thereafter notify him in writing that this has been done and that the disciplines will not be used against him n any way.

(c) Rescind and cease maintaining unlawful rules prohibiting its employees from soliciting for a union in employee work areas or on break time, and notify employees that such rules has been rescinded.

(d) Rescind and cease maintaining unlawful rules prohibiting its employees from discussing their discipline or terms and conditions of employment, and notify employees that such rules has been rescinded.

(e) Within 14 days after service by the Region, post at its facility in Wilmington, North Carolina, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 28, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 23, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily issue warnings to, or otherwise discipline you by issuing warnings pursuant to our disparate application of our no-solicitation clause, and because you engage in union activities.

WE WILL NOT orally promulgate or maintain rules prohibiting union solicitation in employee work areas or on break time.

WE WILL NOT orally promulgate or maintain rules prohibiting you from discussing your discipline or terms and conditions of employment.

WE WILL NOT enforce our no-solicitation rule by selectively and disparately applying it only against those of you who engage in union activities, or by prohibiting union solicitation while permitting nonunion solicitation.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Greg Neubauer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines of employee Greg Neubauer, and within 3 days thereafter notify him in writing that this has been done and that the disciplines will not be used against him in any way.

WE WILL rescind and cease maintaining unlawful rules prohibiting you from soliciting for a union in employee work areas and on break time, and we will notify you in writing that such rules have been rescinded.

WE WILL rescind and cease maintaining unlawful rules prohibiting you from discussing your discipline or terms and conditions of employment, and notify you in writing that such rules have been rescinded.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS